FILE COPY

Court, U.
FEB 8
CHARLES ELMORE CROPLE
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943
No. 396

FRED M. VINSON, Director of Economic Stabilization, by Chester Bowles, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

FRED M. VINSON, Director of Economic Stabilization, by Chester Bowles, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT, PUBLIC UTILITIES COMMISSION

RICHMOND B. KEECH,
VERNON E. WEST,
LLOYD B. HARRISON,
Attorneys for Respondent, Public Utilities Commission,
District Building.

DIVISION OF PRINTING—GOVERNMENT OF THE DISTRICT OF COLUMBIA

INDEX

Page

SUBJECT INDEX

Counter Statement 2
Summary of Argument 20
Argument:
The Petitioners Had Full Notice of the Hearing with Full Opportunity, Which They Exercised, to Present Evidence, to Examine Witnesses and to Make Argument 24
Limitation to Issues Raised by the Order Instituting the Investigation and the Notice of Hearing Is Not a Denial of a Full and Fair Hearing 34
The Petitions of Appeal Fail to State Causes of Action for Which Relief May Be Granted, and the Court of Appeals Properly Directed that the Appeals be Dismissed 35
Intervenors May Not Change or Enlarge the Issues nor Broaden the Scope of the Proceeding. The Intervenors may not Control the Range of Investigation of an Administrative Body 37
Intervention under Emergency Price Control Act and Amendment of October 2 42
Petitioners Assert a Power, Claimed Only Under Inference of a Federal Statute, Which Has For Its Purpose and Direct Consequence the Destruction of State and Municipal Powers in the Field of Local Utility Rate Regulation 46
The Determination of Fact Questions That Have Been Committed to Administrative Bodies Will Not Be Set Aside By the Courts if There Is Substantial Evidence to Support Them. The Ultimate Question on Review of Such Administrative Determinations Is Whether the Total Effect of an Administrative Order Is Unjust and Unreasonable. Administrative Bodies Are Not Bound by a Single Formula or Combination of Formulas 48
Petitioners Argue that the Commission and the Court of Appeals Misconstrued the Purpose and Nature of the Administrator's Requests. The Courts and the Commission Correctly Understood Their Position 52
Evidence Offered by Petitioners Was Received and Considered by the Commission 53
The Petitioners Were Not Denied a Fair Trial Because the Commission Did Not Find Persuasive Their Testimony and Theory that the Sinking Fund Method is the Only Lawful Method of Determining Depreciation 57
The Sliding Scale Arrangement was Adopted After Careful Investigation, Hearing and Consideration 66
Rate of Return 69
The Commission's Order Is Not in Conflict With the Government's Program to Prevent Inflation 72
The Effect of Invalidation of Order No. 2401 in the Annual Application of the Sliding Scale Plan 76
Conclusion 76

TABLE OF CASES CITED

Adler v. *Seaman*, 266 F. 828 37

	Page
Alexander Sprunt & Son v. *United States*, 281 U. S. 249	36, 39
Alabama Power Co. v. *Federal Power Commission*, 75 App. D. C. 315, 128 F. (2) 280	29, 31
American Toll Bridge Company v. *Railroad Commission*, 307 U. S. 486	28
Armour & Company v. *Alton Railroad Company*, 312 U. S. 195	51, 65
Ashbury Truck Co. v. *Railroad Commission*, 52 F. (2) 263	27
Austin v. *Garard*, 61 F. (2) 129	40
Ballard v. *Hunter*, 204 U. S. 241	28
Baltimore and O. R. Co., v. *United States*, 298 U. S. 349	35
Bethlehem Steel Co. v. *Natl. Labor Relations Board*, 74 App. D. C. 52, 120 F. (2) 641	29
Board of Drainage Commissioners v. *Lafayette Southside Bank of St. Louis*, 27 F. (2) 286	40
Board of Trade of Kansas City v. *United States*, 314 U. S. 534	51
Carter v. *Kubler*, ___ U. S. ___, 64 S. Ct. 1, 3, 4	33
Chandler & Price Co. v. *Brantjen & Kluge*, 296 U. S. 53	38
City of Yonkers v. *United States*, ___ U. S. ___, 64 S. Ct. 327	47
Credits Commutation Co. v. *United States*, 177 U. S. 311	36
Crescent Express Lines v. *United States*, ___ U. S. ___, 64 S. Ct. 167	34
Davies Warehouse Company v. *Bowles*, No. 12, October Term, 1943 (January 31, 1944)	42, 44, 46, 47
Dayton Power & Light Co. v. *Public Utilities Commission*, 292 U. S. 290	59
Edw. Hines, Trustees, v. *United States*, 263 U. S. 143	36
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134	40
Federal Power Commission v. *Hope Natural Gas Co.*, Nos. 34 and 35, October Term, 1943 (January 3, 1944)	26, 32, 41, 48, 55, 59, 60, 65
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575	26, 31, 34, 41, 48, 59
Federal Power Commission v. *Pacific Power & Light Co.*, 307 U. S. 156	25, 65
Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349	47
Gray v. *Powell*, 314 U. S. 402	51
Guerra v. *American Colonial Bank*, 21 F. (2) 56	39
Home Furniture Co. v. *United States*, 271 U. S. 456	36
In re Schommer, 112 F. (2) 311	39
In re Veach, 4 F. (2) 334	40
Interstate Commerce Commission v. *Hoboken Manufacturers Railroad Co.*, ___ U. S. ___, 64 S. Ct. 158	50
Interstate Commerce Commission v. *Inland Waterways Corp.* 319 U. S. 671	25, 65
Interstate Commerce Commission v. *Illinois Central Railroad*, 215 U. S. 452	51
Interstate Commerce Commission v. *Union Pacific Railroad*, 222 U. S. 541	25, 51
King v. *Barr*, 262 F. 56	40
L. Singer & Sons v. *Union Pacific Railroad Co.*, 311 U. S. 295	35
L. T. Barringer & Co. v. *United States*, 319 U. S. 1	35
Lewis-Simas-Jones Co. v. *Southern Pacific Co.*, 283 U. S. 654	35
Lindheimer v. *Illinois Bell Tele. Co.*, 292 U. S. 151	59
Los Angeles Gas & Electric Corp. v. *Railroad Commission*, 289 U. S. 287	41, 59
McNutt v. *General Motors Acceptance Corp.*, 298 U. S. 178	36
Midland Realty Co. v. *Kansas City P. & L. Co.*, 300 U. S. 109	31
Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282	51, 52
Moffat Tunnel League v. *United States*, 289 U. S. 113	35
Monongahela Bridge Co. v. *United States*, 216 U. S. 177	28
Natl. Labor Relations Board v. *Ed. Friedrich*, 116 F. (2) 888	29
Natl. Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206	35, 51
New England Divisions Case, 261 U. S. 184	27, 51
Northern Pacific Ry. Co. v. *Dept. of Public Works*, 268 U. S. 39	65

	Page
Ohio Utilities Co. v. *Public Utilities Commission*, 267 U. S. 359	65
Pacific State Box & Basket Co. v. *White*, 296 U. S. 176	35, 36
Phelps Dodge Corp. v. *Natl. Labor Relations Board*, 313 U. S. 177	56
Piedmont & Northern Ry. Co. v. *United States*, 280 U. S. 469	36
Pittsburgh & W. Va. Ry. Co. v. *United States*, 281 U. S. 479	36
Potomac Electric Power Company v. *Public Utilities Commission*, Equity Nos. 35336 and 35341	63
Powell v. *United States*, 300 U. S. 276	36
Premium Ice Co. v. *Maltbie*, 43 N. Y. S. (2) 71	39
Public Service Commission v. *Great Northern Utilities Co.*, 289 U. S. 130	36
Railroad Commission v. *Pacific Gas & Electric Co.*, 302 U. S. 388	27, 49, 59, 72
Rase v. *United States*, 129 F. (2) 204 (6th Circuit)	31
Rochester Telephone Corporation v. *United States*, 307 U. S. 125	51
Securities and Exchange Commission v. *Chenery Corp.*, 318 U. S. 80	72
Shields v. *Utah Idaho Central Railroad*, 305 U. S. 177	25
Simon v. *Craft*, 182 U. S. 427	27
Smith v. *Gale*, 144 U. S. 509	39
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38	36
Standard Oil Co. v. *United States*, 283 U. S. 235	36
State of Florida v. *United States*, 292 U. S. 1	35, 51
State of North Carolina v. *Southern Railway Co.*, 30 F. (2) 204	40
Swayne & Hoyt v. *United States*, 300 U. S. 297	50, 51
Swift & Company v. *United States*, 316 U. S. 216	50
Thorn Wire Hedge Co. v. *Fuller*, 122 U. S. 535	39
Union Trust Company v. *Jones*, 16 F. (2) 236	40
United States v. *Abilene & Southern Ry. Co.*, 265 U. S. 274	65
United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402	35, 50
United States v. *California Cooperative Canneries*, 279 U. S. 553	40
United States v. *Chicago Heights Trucking Co.*, 310 U. S. 344	51, 65
United States v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299	36
Utah Fuel Co. v. *Natl. Bituminous Coal Commission*, 306 U. S. 56	26, 36
Vandalia Railroad v. *Public Service Commission* 242 U. S. 255	30
Virginia Electric & Power Co. v. *National Labor Relations Board*, 319 U. S. 533	51
Virginian Railway Co. v. *United States*, 272 U. S. 658	35, 55
West Ohio Gas Company v. *Public Utilities Commission*, 294 U. S. 63	49, 65
White v. *Hanson*, 126 F. (2) 559	39
Whittaker v. *Brictson Mfrg. Co.*, 43 F. (2) 485	40
Ziffrin, Inc. v. *United States*, 318 U. S. 73	35

TABLE OF STATUTES CITED

Act Creating the Public Utilities Commission:	
Paragraph 7, 37 Stat. 978, Title 43-306	11
Paragraph 8, 37 Stat. 978, Title 43-306	11
Paragraph 18, 37 Stat. 980, Title 43-317	2, 56
Paragraph 32, 37 Stat. 98, Title 43-402	41
Paragraph 63, 37 Stat. 988, Title 43-703	11
Paragraph 66, 49 Stat. 883, Title 43-706	18
Emergency Price Control Act of 1932, 56 Stat. 23	5
Act of October 2, 1942, 56 Stat. 765	5
Section 1, 56 Stat. 765	5
Section 2, 56 Stat. 765	6

MISCELLANEOUS

Amendment No. 3 RO No. 47.—Federal Register	73
National Association of Railroad and Utilities Commissioners, Report of the Committee on Depreciation (1943)	61
7 Federal Register 720, 4857, 6057	73

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943
No. 396

FRED M. VINSON, Director of Economic Stabilization, by Chester Bowles, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

FRED M. VINSON, Director of Economic Stabilization, by Chester Bowles, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

WASHINGTON GAS LIGHT COMPANY, *Respondent*.

CHESTER BOWLES, Administrator, Office of Price Administration, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT, PUBLIC UTILITIES COMMISSION

COUNTER STATEMENT

The Public Utilities Commission of the District of Columbia (the "Commission"), acting pursuant to authority contained in Paragraph 18 of the Act creating it (37 Stat. 986, Title 43-317, D.C. Code 1940; R. I, 246), promulgated Order No. 1458 (R. I, 252; Exhibit "C", Tr. 258), providing a sliding scale arrangement for the annual determination of rates for gas service in the District of Columbia. The plan was promulgated after investigations, valuation proceedings and public hearings extending over a period of 3½ years and costing approximately $750,000 (R. II, 443). The Commission found that the plan was practicable and would be advantageous to all interested parties (Page 3 of Exhibit "C").

The plan provides methods for the annual investigation and determination of the rate base, the amount available for return, the rate of return earned during the "test year" and the amount available for rate increase or decrease for the new "rate year", and rate schedules, rules and regulations accomplishing such increase or decrease in rates (R. I, 39; Exhibit "C", Tr. 258). The plan provides the determination shall be made "after public notice and opportunity for hearing".

The "rate year" is defined to mean "the twelve months' period from September 1st to August 31st, inclusive, for which rates are being determined". The "test year" is defined as "the twelve months' period ending at the close of business on the Adjustment Date". The "Adjustment Date" shall be "June 30th preceding the Rate year" (Exhibit "C", Tr. 258).

The "test year" involved in the proceeding before the Commission was the twelve months' period ended June 30, 1942 (R. I, 253; Schedule 2, Exhibit 1). The "rate year" involved was the twelve months' period beginning September 1, 1942 (R. I, 34).

The basic elements of the sliding scale plan consist of (1)

the method of establishing the rate base for each year; (2) the method and rates of computing annual accruals for retirement reserve, (3) the primary rate of return, and (4) the method of determining the amount available each year for rate increase or decrease. There have been reductions in rates in each year since the plan was adopted in 1935, except the years 1937 and 1941, when no changes were made (R. II, 428, 439).[1] Coincident with the adoption of the plan, rates were reduced more than $800,000 in 1935 (R. II, 415, 357). Smaller reductions were made in the other years all of which have continued in effect since they were made (R. II, 357, 415). The order of October 13, 1942, increased rates for the first time under the plan (R. II, 357).

The Commission, on March 20, 1942, issued its statutory order of investigation into the rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Company, in conformity with the sliding scale arrangement (R. I, 33). On July 21, 1942, pursuant to statutory requirement, the Commission issued notice of hearing relative to the rates, tolls, charges, tariffs, rules, regulations and conditions of service of the Company, to become effective September 1, 1942, "in accordance with the sliding scale arrangement established by Order No. 1458" (R. I, 34).

Both Petitioners were interveners in the proceeding before the Commission. The Price Administrator was represented at the prehearing conference held by the Commission on August 14, 1942, (R. I, 61, 84; R. II, 429) and throughout all subsequent hearings (R. I, 40, 253; R. II, 429). The Price Administrator was permitted to intervene without objection on the opening date of the hearings on August 18, 1942 (R. I, 72, 73). The hearings began on August 18 and continued on August 19 and on September 4, 8, 11 and 14, 1942. They were closed for the first time on the latter date (R. I, 181). The parties,

[1] In Order No. 2682, promulgated November 8, 1943, under the provisions of the plan, the rates were again reduced for the "rate year" beginning September 1, 1943, in the amount of $135,417.

including the Price Administrator, filed briefs on September 25, 1942 (R. I, 62).

At the hearing on August 19, counsel for the Price Administrator requested a continuance of the proceedings to give him time "to determine the extent of the testimony we would want to present, and also the extent of the cross-examination I may want to conduct of the witnesses who have presented their testimony," (R. I, 102). He wanted "an opportunity to have such testimony prepared" (R. I, 104). He asked for a reasonable opportunity "to determine just how far we want to go" (R. I, 106, 107). The request for a continuance was granted (R. I, 61, 110), and the hearing was reconvened on September 4 (R. I, 111). Counsel for the Petitioners cross-examined all witnesses who had testified in the earlier proceedings and presented testimony of three witnesses (R. I, 151-158, 158-169, 169-174; Tr. 797-857), and offered several exhibits all of which were received in evidence (R. II, 413, 420-422). He offered no other testimony.

Upon the petition of others to intervene, the Commission reopened the proceedings and set further hearings for September 30, 1942 (R. I, 62, 181), in which counsel for the Petitioners participated and filed a second brief (R. I, 62, 181). The Record was closed for the second time on September 30, 1942, which was prior to the enactment of the Act of October 2, amending the Emergency Price Control Act of 1942.

Counsel for the Petitioners was afforded every opportunity to present testimony within the scope of the order of investigation and notice of hearing. In addition, at the hearing on September 8, 1942 (Tr. 476), the Chairman of the Commission stated to counsel for the Petitioners:

> "This Commission will be glad to have testimony regarding the aims and purposes of the Office of Price Administration during this period of national emergency, and we are very much interested in learning the attitude of the Office of Price Administration as

to the relation of those aims and purposes to the present proceeding." (R. I, 123; R. II, 416.)

The Chairman stated that the Commission would be faced with the question, whether in view of the national emergency, the rates and charges for gas services should be increased and that—

> "It is expected that the Office of Price Administration, as intervener in these proceedings, will develop its testimony along lines which will assist us in arriving at a determination of this question at an early date." (R. I, 123.)

Other requests were made by the Chairman that counsel for the Petitioners give the Commission the benefit of the views and policies of the Office of Price Administration, relating to the questions before the Commission (R. I, 126, 133, 138, 139-140, 143; R. II, 416, 417, 443).

After the proceedings had been closed for the second time on September 30, 1942, the Commission took under consideration the record and briefs, and on October 13, 1942, issued its findings and opinion, and Order No. 2401 (R. I, 39-57).

The Emergency Price Control Act of 1942 (56 Stat. 23) was amended on October 2, 1942 (56 Stat. 765).

Section 302 (c) of the Emergency Price Control Act (56 Stat. 36) contains the following provision:

> "*Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *."

Section 1 of the amendment of October 2 (56 Stat. 765) provides that no common carrier or other public utility "shall

make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency".

Section 2 of that amendment provides that the President may suspend Clause (1) of Section 302 (c) of the Emergency Price Control Act "but he may not under the authority of this Act suspend any other law or part thereof." The President was not given authority to suspend Clause (2) of Section 302 (c) which denied to the Price Administrator the regulation of common carrier or other public utility rates. Clause (2) of Section 302 (c) was not modified or repealed by the amendment of October 2.

Under the terms of the sliding scale arrangement, the "rate year" begins September 1, but in view of the Act of October 2, the Commission directed the Company's attention to the requirement of Section 1 thereof. After referring to the provisions of the sliding scale plan relating to the beginning of the "rate year", the Commission said:

> "However, the Commission directs the attention of the Company to the provision contained in the Act, approved October 2, 1942, entitled * * *." (R. I, 56.)

Following this direction, the Commission then quoted the specific language in Section 1 (R. I, 56).

Pursuant to the direction contained in the order and the provisions of Section 1 of the Act of October 2, the Company, on October 15, 1942, served notice upon the Director of Economic Stabilization (the "Director") of the proposed increase in rates and also served upon him a copy of the Commission's order of October 13, as well as a copy of Order No. 1458 which established the sliding scale arrangement (R. I, 3, 7, 11, 187-190; R. II, 429). The Company later consented to the intervention by the Director (R. I, 3, 8, 191; R. II, 430). The Director alleged in his petition of appeal to the District Court that

he was given the thirty days' notice on October 15, and that consent to intervene was given by the Company (R. I, 3). The Court of Appeals found that the thirty days' notice and consent to intervene, required by the Act of October 2, were duly given (R. II, 429, 430, 431) and that the provisions of that Act "were complied with" (R. II, 431). The District Court made no finding in respect of compliance with the Act of October 2 (R. I, 15-20).

Following the enactment of the amendment of October 2 and the notice to the Director pursuant to the provisions of that Act, the same counsel who had participated in all prior proceedings for the Price Administrator, filed with the Commission on October 19, 1942, in the name of the Price Administrator, a petition on behalf of the Director asking (1) that the Commission vacate the order of October 13; (2) that the proceeding be reopened; (3) that the Director be allowed to intervene in the proceedings, and stated that the issuance of the order without permitting him to intervene denied him—

> "his right to appear in this proceeding for the purpose of presenting evidence or argument concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942 as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities." (R. I, 59,66.)

Pursuant to the petition on behalf of the Director, the Commission on October 23, 1942, reopened the proceedings for the second time (R. I, 60-63) and granted the Director the right to intervene and set the matter for further hearing on November 2—

> "for the purpose of receiving from the Office of Price Administration, on behalf of the Director of Econom-

ic Stabilization, additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and intervention is granted for such purpose." (R. I, 62-63.)

When the reopened proceedings came on for further hearing on November 2, the same counsel who had participated in all previous proceedings and filed two briefs for the Price Administrator, again appeared as counsel for the Petitioners. He did not call any witnesses in the reopened proceedings on November 2, but again renewed a motion which had previously been filed with the Commission that the proceedings be reopened "without restriction as to the type of evidence to be presented", and that the Commission vacate its order of October 13 (R. I, 200). In support of the motion to vacate the order of October 13, he said "the basic issue here is the question of the revocation of the Commission's order" (R. I, 220).

The Commission denied the motion and the Chairman announced that the Commission was ready to receive evidence in accordance with the order reopening the proceedings on behalf of the Director. Counsel for the Petitioners did not call a single witness on November 2 (R. I, 183-220). The Chairman of the Commission again asked counsel whether he had any testimony to present along the lines laid down in the Commission's order reopening the proceedings on behalf of the Director. He then asked for a continuance until November 4 for the purpose of permitting him to consult with his associates about further proceedings (R. I, 215, 217, 218, 220), which request was granted (R. I, 220).

When the hearing reconvened on November 4, counsel for the Petitioners recalled to the witness stand an official of the Company for the purpose of showing that his computation of the accrual for Federal income taxes would be changed by reason of the enactment of the Revenue Act of 1942, which fact did not affect the Commission's determination of net income

(R. I, 221-226). The Company's computation was disregarded entirely because the Commission predicated its allowance for Federal income taxes at 31% pursuant to the provisions of the Revenue Act of 1941, instead of the rate of 40% contained in the Revenue Act of 1942, as set forth in its Order No. 2401. At the conclusion thereof counsel for the Petitioners stated:

> "We think the record is clear now that the Commission's order is inflationary in character." (R. I, 226.)

He offered no other evidence (R. I, 67, 220-229).

The proceedings were closed for the third time on November 4, 1942 (R. I, 229), without any testimony relating to "the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act of 1942 as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities." (R. I, 183-229; Tr. 969-1149).

The Commission reconsidered the record and the testimony offered on behalf of the Director, and on November 9 issued Order No. 2418 (R. I, 66-67), in which it reviewed the proceedings and the testimony, and found that:

> "The evidence adduced fails to show that the rates authorized by Order No. 2401 are inflationary",

and accordingly denied the petition on behalf of the Director to vacate Order No. 2401, promulgated on October 13 (R. I, 67).

On November 16, thirty days after the Company had given notice to the Director of the proposed increase in rates, the Company put the new rates into effect as of that date (R. I, 14; R. II, 363, 429, 430, 431).

Notwithstanding the statutory order of investigation and

notice of hearing calling for the annual proceedings under the provisions of the sliding scale plan, the Price Administrator, as intervener, sought to change the scope of the investigation and the hearing by enlarging it into a reconsideration and revision of the sliding scale plan itself, rather than a determination under the terms of the plan (R. I, 38; R. II, 440, 441). The order instituting the investigation and the notice of the hearings did not call for a reconsideration and revision of the provisions of the plan.

That it was the intent and desire of the Petitioners to depart from the notice of investigation and hearing is best illustrated by the following. They sought to have the Commission review the plan "for revision of the provisions of the 'sliding scale arrangement' " (R. I, 38); that the Commission "review the basic phases of the sliding scale arrangement" (R. II, 374); reopen the proceedings again "without restriction as to the type of evidence to be presented or otherwise limiting the scope of further hearings to be held in this matter" (R. I, 65, 200); and "to throw the case wide open" (R. II, 400). They also requested the "proceeding be broadened" (R. I, 167) "without restriction as to the type of evidence to be presented" (R. I, 200) and with "no strings or restrictions attached" (R. I, 206). Counsel for Petitioners further insisted that "we must have the right to go into at least the following factor", and then enumerated the various factors which constitute the basic elements of the sliding scale plan, namely, (1) the method of determining the rate base and why it should not be changed, (2) the method of computing annual accruals for retirement reserve, (3) what are proper operating expenses, (4) what are proper income taxes to be allowed, and (5) the question of the rate of return (R. I, 207; R. II, 440, 441).

The Petitioners made no offer of proof in connection with any of the basic elements of the plan (R. II, 441).

The Commission refused to depart from the investigation

instituted by the order of March 20 and the notice of hearing of July 21.

The Chairman of the Commission announced on September 14, 1942, that when the Commission decides to open an investigation on the sliding scale arrangement "it will give appropriate notice and conduct that investigation as a separate problem" (page 772, proceeding before Commission). Reconsideration was given to provisions of the plan in Formal Case 334, after order of investigation and notice, and the primary rate of return was reduced (Order No. 2682).

The Act creating the Commission provides it shall have power to adopt reasonable and proper rules and regulations relative to investigations made by it "and to adopt and publish reasonable and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it" (R. I, 248). The Commission's Rules of Practice and Procedure provide it may grant or deny a petition for leave to intervene or may grant it "upon such conditions and limitations as it may prescribe". The rules provide that granting such a petition "shall not have the effect of changing or enlarging the issues in the proceeding", except when such change or enlargement "is expressly requested in the petition and is expressly granted by the Commission after opportunity for hearing upon the question has been afforded all other parties" (R. I, 251, 252). The petitions to intervene did not expressly request a change or enlargement of the issues (R. I, 34-37, 57-60), nor did the Commission change or enlarge them.

The statute requires the Commission to advise the utility of matters under investigation that require formal hearings and give notice of the time, place and the matters to be heard. No order affecting fair value or rates may be issued by the Commission without a formal hearing (R. I, 247-248).[2]

[2] Paragraph 7 of the statute (37 Stat. 978, Title 43-306, D. C. Code) provides "That the Commission shall value the property of every public utility * * * at the fair value thereof at the time of said valuation." Paragraph 8 provides that before holding a public hearing in a valuation proceeding, the Commission must give the utility "notice of not less than thirty days".

Under the order of investigation, the accounting staff made a complete and detailed audit of the Company's books and records which comprised a total of 2,110 man hours (R. I, 88). The Commission's Chief Accountant and Chief Engineer presented detailed testimony relating to all of the basic facts involved in the application of the sliding scale arrangement, including the determination of the rate base, accruals for retirement reserve, the rate of return earned and the net amount available for rate adjustment and an allocation of the property in the District of Columbia and outside the District. The Chief Accountant prepared and introduced Exhibit No. 1, consisting of six schedules which set out in detail the basic findings and supporting data. Schedule 1 shows the summaries of the adjusted operating revenues, adjusted operating expenses, net amount available for return prior to adjustment, the adjustments, the rate of return earned and the net amount available for rate adjustment. That schedule and the testimony supporting it show that after disregarding all excess profits taxes as operating expenses the Company earned during the test year 5.1059%. The allowance of all excess profits taxes as an operating revenue deduction (Exhibit No. 1, Schedule 5, Page 4) would reduce the earned rate of return to 4.95%. This computation was made prior to the enactment of the 1942 Revenue Act, and does not give effect to a slight saving by reason of the credit allowed for preferred stock dividends in the computation of surtax net income.[3]

The rate base unweighted at June 30, 1942, prior to any allocation for service rendered outside the District of Columbia and before including working capital, was $30,701,806.87. (Ex. 1). This amount was arrived at after deduction of $1,737,571.78 for contributions in aid of construction and deposits for extensions of mains. Thus the unweighted rate base at June 30th is predicated on $32,439,378.65 for gas plant in

[3] The rate of return of 4.87% found by the Court of Appeals (R. II, 428) was based upon the Company's computation of rate base and income as reflected on Exhibit No. 2.

service. This latter amount contains $1,055,549.52 representing the difference between the appraised value of land and the original cost of land. The rate base therefore, insofar as gas plant in service is concerned, is 96.75% original cost as best it can be determined.

Schedule 2 shows the determination of the rate base on a weighted and an unweighted basis. Schedule 3 shows the adjusted operating revenues of the Company during the test year, and Schedule 4 shows the adjusted operating expenses. Schedule 5, consisting of four pages, shows in detail the accounting adjustments in operating revenues and operating expenses which were reflected on Schedules 3 and 4. Schedule 6 is a comparative statement of unadjusted net operating income for the test years ended June 30, 1942, and June 30, 1941, and shows the MCF [4] operating revenues and operating expenses, as well as increase or decrease in MCF in both operating expenses and operating revenues (Tr. 101).

The Petitioners accepted the audit of the Company's operating accounts made by the Commission's staff (R. II, 400), and did not question any of their calculations (R. II, 392).

Exhibit No. 2 shows a comparison between the computations made by the Company and the Commission's staff in the determination of the net amount available for return. This exhibit also contains a statement of the reasons for the difference in the computations. Exhibit No. 3 is made up of the records of the proceedings before the Commission in two finance proceedings relating to the Company, involving an increase in the capitalization of the Company by the issue of $4.25 preferred stock and issue and sale of $5 cumulative preferred stock. Exhibit No. 4 shows the allocation of the property in the rate base in the District of Columbia and outside the District. Exhibit No. 5 was presented by the Company to set forth various proposed rate schedules and the schedules to which adjustments should be carried and the general serv-

[4] One thousand cubic feet.

ice provisions and rules and conditions of service. The Commission's staff presented proposed rate schedules, carrying into effect the proposed adjustments which were adopted by the Commission (R. I. 53). Exhibit No. 9 was prepared by the Company upon request and presented by the Commission's counsel for the purpose of showing the effect of the proposed increased rates upon domestic consumers and the distribution of increases by various schedules. This exhibit also shows the effect of the proposed rate increase on commercial and industrial consumers and the distribution by schedules and the general effect of the rate increases on consumers. In addition to the foregoing exhibits and oral testimony supporting them, a stipulation, prepared by the conferees following the prehearing conference, was submitted setting forth the facts relating to issues as to which the conferees could not reach agreement.

The Petitioners offered no evidence in respect of the basic questions raised by the order of investigation and the notice of the hearing, except that one witness presented Exhibit No. 8, which was made up from computations made by the Commission's staff and the Company as shown on Exhibit No. 2, in which the witness substituted, at the request of counsel for the Petitioners, a sinking fund in lieu of retirement reserve, and computed income taxes at 19% (R. I, 160). The Petitioners offered no testimony in respect of the rate base, the rate of return earned, or the proper percentage for accruals for depreciation, or as to the propriety or the application of the method of determining the amount available for rate adjustments, as set forth in the sliding scale plan. They offered no testimony as to the fairness or reasonableness of the rates in effect prior to the investigation or the rates in the proposed schedules. They offered no testimony on what constituted a fair and reasonable rate of return or the effect thereon of the proposed rates.

Paragraph 63 of the Public Utilities Act (37 Stat. 988, Title 43-703 D. C. Code) makes the findings of the Commission in

respect of rates, tolls and charges prima facie reasonable (R. I, 246).

The accounts of the Company are kept pursuant to the Uniform System of Accounts for Gas Companies, prescribed by the Federal Power Commission, and adopted by the Commission. However, the computations of retirement accruals for rate-making purposes are made according to the provisions of the sliding scale plan.[5]

The Commission found that the operating expenses of the Company with the adjustments made by it and described in its findings were recorded in accordance with the Uniform System of Accounts, and that such expenses as so adjusted were fair and reasonable and proper in the determination of rates under the sliding scale plan. (R. I, 47-48). The Uniform System of Accounts states that the operating expenses accounts (701 to 809) "are designed to show in detail the cost (except depreciation, amortization and depletion, certain property losses, and taxes) of furnishing gas utility service" (R. I, 47).

The calculations made by the Commission's staff showed that, under the sliding scale, the Company was entitled to a rate increase of $324,718.06 after disregarding all excess profits taxes; the Company's computation indicated an increase of $381,597. The difference in the calculations was due to adjustments in operating expenses and taxes (R. I, 254; R. II, 435). In the light of existing conditions and to prevent any inflationary effect which such allowance would invite, the Commission disallowed as operating expenses all excess profits taxes and Federal income taxes greater than 31% of the Company's tax liability (R. I, 258, 261-262; R. II, 436, 438). After giving consideration to all factors (R. I, 254, 262, 265; R. II, 437, 438), including economic conditions due to the war (R. II, 435), the Commission reduced the computations under the sliding scale by $123,293.32 below that made by the Commission's

[5] The annual charges for retirements under the sliding scale plan are reduced by interest accruals on the retirement reserve balance compounded on a monthly basis.

staff (R. I, 266; R. II, 429) and found the Company was entitled to an increase in rates which would produce $201,424.74 (R. I, 265, 268; R. II, 429). The rate schedules put into effect increased rates by $200,141 [6] (R. I, 266). Petitioners did not question the calculations under the plan (R. II, 392).

Since there was no rate adjustment in 1941 the rates in effect during the test year involved (July 1, 1941, to June 30, 1942) were those established by Order No. 1921, effective as of September 1, 1940. Those rates were based upon the operating experience of the Company for the test year July 1, 1939, to June 30, 1940 (R. I, 40).

The total increase for all customers was 2.28% in excess of rates in the preceding rate year (R. I, 267; R. II, 438). Domestic consumers using 2500 cubic feet or less per month had no increase in their rates. The Commission found that the cost of gas constitutes only 1.17% of the average cost of living in Washington and that the increase in rates would increase the cost of living index by only about 1/37th of 1%. The Commission found that such increase would not have material inflationary tendencies (R. I, 267; R. II, 438).

To guard against the possibility of increase in rates that might result in the liability for excess profits taxes in the new rate year derived from the rate increase authorized, the Commission incorporated in its order a provision that if the increased rates should impose a liability for excess profits taxes, any such amount should be recorded in a specially provided deferred credit account and refunded to consumers [7] R. I, 49, 56-57).

---

[6] See footnote (7) *infra*.

[7] Additional revenue resulting from the increased rates for the period November 16, 1942, when the new rates were put into effect, to December 31, 1942, in the amount of $38,858 were refunded by reason of the above mentioned provisions in the order. Accordingly, customers were billed at the new rates only for the period January 1 to August 31, 1943, the effective date of a new rate Order No. 2682, which reduced the rates for the rate year beginning September 1, 1943. The Company has computed the revenues in the eight months from January 1 to August 31, 1943, resulting from the increase in rates authorized in Order No. 2401 as $142,400.26. The net result, therefore, of the rate increase is $142,400.26 instead of $201,424.74, authorized by Order No. 2401. The rates authorized by Order No. 2682, effective September 1, 1943, based on sales for the test year July 1, 1942, to June 30, 1943, provides for a reduction of revenue of $132,896.

During the test year involved, labor costs included in the operating expenses of the Company were approximately $380,000 more than the prior test year or approximately 16% increase in wages[8] (R. I, 51, 109, 110). This wage increase was based upon the cost of living index (R. I, 109). The District of Columbia Gas Workers Union urged an increase in rates to enable the Company to pay its employees on a basis comparable to other utility employees (R. I, 108-110).

In its findings and opinion accompanying Order No. 2401, the Commission discussed the nature of the proceedings and in some detail discussed the various issues and the testimony relating to them and made its basic findings of fact and stated its conclusions thereon (R. I, 39-55). It promulgated its order carrying into effect the findings and conclusions reached (R. I, 55-57). The order sets out the various schedules containing the blocks of gas in cubic feet and the rate for each block for the various rate schedules in the rate structure, with the rules, regulations and conditions of service under which the Company is required to furnish gas service.

The Company took no appeal from the Commission's order. After giving thirty days' notice to the Director (R. I, 3, 7, 11, 187, 188), the new rates became effective as of November 16, 1942 (R. II, 363, 429, 430, 431). The Petitioners, who were interveners before the Commission, took an appeal from the Commission's order to the District Court.

The District Court found that the proceeding was instituted under the order of March 20, 1942, under the provisions of the sliding scale arrangement (R. I, 16), and that the Price Administrator requested the Commission "to reconsider the basic principle of the sliding scale arrangement in the light of the Government's program to prevent increases in the cost of living and to stabilize prices" (R. I, 17). The Dis-

[8] The wage increase experienced by the Company during the test year was more than $237,000 greater than the net rate increase after the refund referred to in footnote (7) was made. The publicly announced policy of the Price Administrator, as well as the national policy in fixing commodity prices, is to give effect to increase in wage rates and the cost of production. If the Commission had given effect to increased labor costs alone, it would have been justified in authorizing an increase in rates far in excess of the amount ordered by it.

trict Court found that the Petitioners complained because the Commission refused "to broaden the scope of its inquiry beyond the purpose indicated in the order of March 20, 1942" (R. I, 17, 18). The Court found that the action of the Commission was arbitrary and illegal because it "regarded" the inquiry "within the scope of the order of March 20" (R. I, 18), and vacated the Commission's order (R. I, 20). The District Court denied motions of the Commission and of the Company to dismiss the appeals from the Commission's order. Both the Commission and the Company appealed from that judgment.

The District Court made no findings or determinations as to the reasonableness of the rates prescribed in the order of October 13.

Paragraph 66 of the Act creating the Commission (49 Stat. 883) provides that in the determination of an appeal from an order of the Commission, the review of the Court "shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary or capricious". The District Court made no findings in respect of the facts.

The United States Court of Appeals for the District of Columbia (the "Court of Appeals") found that "the order of the Commission was issued only after a deliberate and careful study of the factors affecting the business of the utility in wartime Washington without a trace of hasty or arbitrary conduct on the Commission's part" (R. II, 438). It found that the Commission's findings were based on convincing evidence (R. II, 438), and that "findings, supported by substantial evidence, were made" (R. II, 435), after careful consideration of all factors having a bearing on the case (R. II, 437). The Court of Appeals stated that the important issue in the case turns upon the action of the Commission in confining the rate investigation to an application of the sliding scale to prevailing conditions and a consideration of the possible inflationary

effect of a price increase, and in refusing a demand of the Price Administrator that a thoroughgoing examination be made into the rate base, the rate of return, operation expenses and depreciation and all other matters relative to the establishment of a fair return (R. II, 431).

After discussing the requests of the Petitioners that the Commission institute a different kind of investigation, the Court of Appeals said:

> "In its essence, the question raised in this aspect of the case is whether the Commission, as the regulatory body, or the Price Administrator, as intervener, should control the scope of the investigation. We do not think that the mere right to intervene in a rate proceeding conferred upon the Price Administrator by the Act of October 2, 1942, includes the power to compel the regulatory body to undertake a complete rate investigation against its better judgment, much less an investigation upon lines contrary to the governing statute" (R. II, 442).

The Court of Appeals further said there was no refusal on the part of the Commission to receive evidence with regard to the inflationary effect of an increase of rates and that:

> "The conflict arose when the Price Administrator departed from the field committed to his care and demanded that the Commission suspend the application of the sliding scale, and reexamine its basis in a complete investigation of all the elements that enter into the determination of a utility rate by a regulatory body" (R. II, 443).

The Court of Appeals said "the provision of the Amendatory Act, requiring prior notice and consent to intervention by the Presidential agency, were complied with" (R. II, 429,

430, 431). That Court found that counsel for the Price Administrator "was given all opportunity to participate within the scope of the proceedings fixed by the Commission" (R. II, 429).

The judgment of the District Court was reversed (one Justice dissenting) and the cases remanded with instructions to dismiss the appeals from the Commission's orders (R. II, 443).

SUMMARY OF ARGUMENT

I

The Commission issued an order for the annual investigation and determination of rates under the provisions of the sliding scale arrangement, and issued its "Notice of Hearing" for that specific purpose. "The hearing" conducted by the Commission was that authorized by its order of investigation and the notice of hearing.

The Price Administrator offered evidence of three witnesses and several exhibits, all of which were received by the Commission and given consideration in its determinaton and findings and Order No. 2401. He offered no other evidence. He cross-examined all witnesses and filed two briefs with the Commission. He was not limited in the presentation or offer of evidence in the hearing called for by the order of investigation of March 20 and the notice of hearing of July 21, 1942.

The Price Administrator had notice of the hearing and the right to present evidence, to cross-examine witnesses, to make argument, and to file briefs. He had a full and fair hearing.

The Price Administrator, on behalf of the Director, asked the Commission to reopen the proceedings for the purpose of permitting him to offer testimony concerning the comprehensive national economic policy developed in accordance with the provisions of the Emergency Price Control Act as amended by the Act of October 2, 1942, and the effect thereon of increases in rates and charges of common carriers or other public utilities.

The proceeding was reopened for the purpose of permitting the Price Administrator, on behalf of the Director, to present additional evidence relating to the inflationary effect, if any, of the increase in rates authorized by Order No. 2401, and he was granted the right to intervene

When the hearing reconvened on November 2, for the purpose of receiving evidence on behalf of the Director, his counsel offered no evidence.

At the continued reopened hearing on November 4, counsel for the Director called an official of the Company for further cross-examination about a computation made by him and presented in evidence in August. The Director offered no other evidence. Having abandoned the purpose for which he sought intervention, the Director has no cause to complain. He had a full and fair hearing.

The fact that the Commission did not find persuasive the Petitioners' theories or evidence does not amount to denial of due process.

II

The Commission's findings and its order are supported by substantial evidence, and its findings are adequate to support the order. The Price Administrator has no authority to control or regulate public utility rates, and none of his legal rights has been invaded by the Commission's order. His appeal stated no cause of action.

The refusal of the Commission to depart from its order of investigation and its notice calling for the hearing violated none of the legal rights of the Petitioners. The issues sought to be raised by the Petitioners were outside of the scope of the order instituting the inquiry and the notice of hearing. The refusal of the Commission to review, in the instant proceeding, the provisions of Order No. 1458 and to revise the sliding scale method did not give the Petitioners a cause of action. The sliding scale arrangement was promulgated under statutory authority and

could not be attacked in the instant proceeding. The court below correctly directed that the appeals be dismissed.

III

The requests of the Petitioners, as interveners, that the Commission enlarge the issues and broaden the scope of the hearing for the purpose of permitting them to attack the provisions of the sliding scale plan, promulgated in 1935, were not in subordination to nor in recognition of the inquiry instituted. The effort of the interveners to depart from the order of investigation and the hearing called for by the notice was in defiance of the power of the Commission to act pursuant to its order and notice, and was an effort to dispossess the Commission of its jurisdiction to determine rates under the sliding scale method. Interveners may not come into a proceeding for the purpose of trying, in that proceeding, issues outside of the scope of the original inquiry. Interveners may not attack the propriety of the main proceeding or collateral decrees.

The Commission is authorized by statute to make reasonable rules governing its proceeding and to regulate the mode and manner of all investigations and hearings before it. The Commission, in the instant proceeding, acted in accordance with the statute, its Rules of Practice and orderly procedure. The purpose of intervention is to permit the intervener to litigate in that proceeding any rights he has therein, but not to litigate matters unrelated to the main proceeding.

IV

The Petitioners asserted a power which they do not possess, and which is violative of Congressional intent expressed in the Emergency Price Control Act. They asserted a power directly contrary to the express prohibition of Clause (2) of Section 302 (2) of the Emergency Price Control Act, and sought radiation beyond the obvious meaning of Section 1 of the amendment of October 2

This Court has recently held that the control of common carrier and other public utility rates was expressly denied the Price Administrator.

V

The question on review of the order of an administrative body, is whether "viewed in its entirety", it meets the requirement of statutory authority. In the determination of "just and reasonable rates", it is the result reached and not the method employed which is controlling. If the total effect of the order produces no arbitrary result, an administrative order supported by substantial evidence will not be disturbed by the court. The Commission was not bound by any single formula or combination of formulas in the determination of its administrative functions. The weight of the evidence is for the administrative body. A court is not at liberty to prescribe the general attitude the Commission must adopt towards the exercise of its discretion. Judicial action may not supplant the discretionary authority, even if the court should reach a different conclusion upon the evidence. Rate-making calls for enlightened judgment by a body appointed by law and best fitted by training and experience to determine complex questions involved in rate regulation. The legislative discretion implied in rate-making extends to the entire process, embracing the method used in reaching the determination, as well as that determination itself.

VI

The Commission gave consideration to all the evidence and every factor involved, and made its findings upon the evidence of record. In its determinations, it gave consideration to emergency conditions and the Government's policy to prevent inflation. The increase in rates authorized by the Commission was considerably less than the increase in labor costs experienced by

the Company during the test year. The rate increase was not in conflict with the Governmental policy to grant price increases where the cost of production and increase in wage rates justify such increases. An order of an administrative body carries with it a presumption of validity and he who seeks to override it carries a "heavy burden".

ARGUMENT

The Petitioners Had Full Notice of the Hearing with Full Opportunity, Which They Exercised, to Present Evidence, to Examine Witnesses and to Make Argument.

The principal contention made by the Petitioners below and here is that they were denied a full and fair hearing. What hearing? In what proceeding? The order of March 20, 1942 (R. I, 33), called for an investigation of the rates "in conformity with the sliding scale arrangement". That investigation was carried forward continuously from the date of the issue of the order for the purpose stated therein. Section 2 of the order gave notice of the intention of the Commission "to hold a public hearing on the subject matter of the investigations." On July 21, 1942, the Commission issued its "Notice of Hearing" (R. I, 34), of the time, place, and the subject matter of "the hearing". The subject matter of the hearing, as set forth in the notice was—

> "relative to the rates, tolls, charges, tariffs, rules, regulations, and conditions of service of the Washington Gas Light Company, to become effective September 1, 1942, in accordance with the sliding scale arrangement established by Order No. 1458".

That was "the hearing" conducted by the Commission. That was the proceeding instituted by the Commission. Following the provisions of the plan and the practice since the plan was

establishing in 1935, the accounting staff made a complete audit of the Company's books, taking 2,110 man hours (R. I, 88). The Company's accounts are kept in accordance with the Uniform System of Accounts for gas companies, prescribed by the Federal Power Commission and by this Commission (R. I, 47). Not only are the Company's accounts strictly regulated (which is not true of commercial enterprises over which the Price Administrator is given jurisdiction), but its rates, its charges, and its rules, practices and conditions of service are likewise regulated strictly in accordance with the Commission's orders.

When the audit was completed, and the Commission's staff made its determinations, "the hearing" began. The staff presented its studies and exhibits, detailed by the oral testimony of the Commission's Chief Accountant and Chief Engineer. The Company presented its evidence through its officials. The staff and the Company did not arrive at the same conclusions, because of certain adjustments made by the Commission's staff in the operating expenses and taxes, and those required by the provisions of the sliding scale plan (R. I, 41). The evidence shows (R. I, 87-89), that as a result of the audit the Company made adjustments in the operating expense accounts to conform with the requirements of the Uniform System of Accounts.

The authority to regulate public utility rates in the District of Columbia has been conferred upon the Commission. The question on judicial review of administrative findings under statutory powers, is whether the administrative body acted within its statutory authority. *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 160; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, 691; *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541, 547; *Shields* v. *Utah Idaho Central Railroad*, 305 U. S. 177, 185. Did the Commission have authority to issue its Order No. 1458, establishing a sliding scale method of determining rates? Congress gave the Commission that

authority in Paragraph 18 of its Act (R. I, 246). Counsel for the Petitioners asserted that "in any determination of rates" the Commission cannot be governed by the sliding scale arrangement (R. I, 125); he said "as a matter of fact it would be illegal for the Commission to fix rates" without granting the requests he had made (R. I, 140).

Under the provisions of the sliding scale arrangement, the Commission instituted its annual investigation and gave notice of a formal public hearing on the subject matter of that investigation. That was the hearing conducted in Formal Case 316, resulting in the findings and opinion and Order No. 2401, entered October 13, 1942. The plan itself was established under the authority of Paragraph 18, as both the District Court (R. I, 15-16) and the Court of Appeals (R. II, 428) stated. The Commission's action in adopting a sliding scale arrangement pursuant to its Paragraph 18 is not subject to challenge by the Petitioners. *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56, 59, 61-62; *Federal Power Commission* v. *Natural Gas Pipe Line*, 315 U. S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, October Term, 1943.

The record shows that the Price Administrator had notice of the hearing and participated in all proceedings; he had full opportunity to present evidence; he exercised the opportunity and presented evidence of three witnesses, including exhibits (R. I, 151-177). His counsel examined his own witnesses, and when he had finished, announced "That is all" (R. I, 169). He cross-examined at great length all witnesses presented by the Commission and the Company. His counsel made many and long arguments. He filed two briefs with the Commission (R. I, 40, 181). He had the right to challenge the evidence presented by the Commission's staff and by the Company. But he accepted the staff's audit of the operating accounts (R. II, 400) and the calculations made by it (R. II, 392). It was at this hearing, called by the notice of July 21, that the Price Administrator presented his evidence, cross-

examined witnesses, made arguments and filed briefs. This Court has said on many occasions that when such opportunity has been given a full and fair hearing has been granted. When such opportunity has been granted, due process is fully met. *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388. Not only did the Price Administrator have the opportunity to present all evidence relating to the subject matter of the investigation, but he was requested on numerous occasions, by the Chairman of the Commission, to present any facts he had relating to the aims and purposes and policies of the Office of Price Administration and "the relation of these aims and purposes to the present proceeding". (R. 1, 123, 126, 133, 138, 139, 140, 143).

What hearing do the Petitioners refer to when they say they did not have a full and fair hearing? Not the one called for under the order of March 20, 1942, or the one held pursuant to the "Notice of Hearing" issued July 21, 1942.

The Price Administrator was allowed to intervene in the proceeding without objection. His counsel was granted a continuance of the proceeding from August 19 to September 4, 1942, for the purpose of preparing evidence to present and for the purpose of preparing cross-examination of all witnesses (R. 1. 102, 104). The hearing was reconvened and the Price Administrator's counsel cross-examined every witness who had testified, some at great length, and presented oral and documentary evidence, all of which was received. The Price Administrator had notice of the order of investigation and notice of "the hearing". He was "apprised" of the nature of the hearing and was "afforded the opportunity to offer evidence and to examine that of the opposition". Under the circumstances, he has had his "day in court, and may not now be heard to complain". *Ashbury Truck Co.* v. *Railroad Commission*, 52 F. (2) 263, affirmed 287 U. S. 570. The Petitioners had a full and fair hearing. *New England Divisions Case*, 261 U. S. 184; *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 393; *Simon* v. *Craft*, 182 U. S. 427, 45 L. ed. 1165.

This Court in *Ballard* v. *Hunter*, 204 U. S. 241, 255, 51 L. ed. 461, said the fundamental requirement of due process is an opportunity for hearing and defense, "but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case."

In *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 194, this Court said the appellant was mistaken in its contention that it did not have such a hearing as it was entitled to have under the law when it had full notice of the action and appeared at the hearing with liberty to contest the facts and introduce any evidence "pertinent to the case" with the right to a full and fair disclosure of "the material facts". The right to challenge the provisions of Order No. 1458 and to establish a new method of determining a rate base and a new method of determining depreciation, and all of the other factors entering into a complete new valuation proceeding were not pertinent nor material to the order of investigation dated March 20, or to the notice of the hearing dated July 21, 1942.

As the record shows, and as Petitioners admit in their brief, they sought to have the Commission broaden the scope of the hearing and to enlarge the issues for the purpose of reviewing and revising the "basic phases" and the "basic elements" of the provisions of the sliding scale plan, promulgated by Order No. 1458. The Commission's refusal to enter into a different kind of investigation than that instituted by the order of March 20 and the notice of hearing of July 21, 1942, did not deny the Petitioners a full and fair hearing. Limiting the investigation and the hearing to the subject matter of the order and the notice was not a denial of procedural due process. In *American Toll Bridge Co.* v. *Railroad Commission*, 307 U. S. 486, 494, the Bridge Company asked the Railroad Commission of California to enlarge a rate investigation concerning tolls at Carquinez bridge. The Company moved that the Commission "include with this proceeding an investigation of the Antioch bridge tolls", and complained that it had been denied procedural due process because the Commission limited

the investigation to the tolls on the first bridge only. This Court said:

> "The record discloses no basis on which it reasonably may be held that by limiting the investigation to the Carquinez tolls the commission abused its discretion, and clearly there is no foundation for the claim that in excluding the Antioch the commission denied appellant procedural due process."

In *Bethlehem Steel Co.* v. *Natl. Labor Relations Board*, 74 App. D.C. 52, 120 F. (2) 641, at 651, the petitioners contended that it did not have a fair hearing on the ground, among others, that an application for a subpoena to an officer of the S.W.O.C. was denied. The petitioners desired to question the officer regarding the dates, scope, duration and terms of an agreement between S.W.O.C. and the United States Steel Corporation or any of its subsidiaries. The Court of Appeals for the District of Columbia said those agreements were irrelevant in the proceeding and "were not on trial". The Court there said a hearing is not made unfair by a refusal to summon a witness in order that he may be asked irrelevant questions. Neither can a hearing be made unfair by denying a motion to go into matters not relevant to the hearing instituted. This Court denied certiorari, 317 U. S. 652, to review the decision in *Alabama Power Co.* v. *Federal Power Commission*, 75 App. D. C. 315, 128 F. (2) 280, where the lower court found that the Company had been afforded every reasonable opportunity on the particular question involved but, instead, chose to challenge the power of the Commission and "failed to take advantage of the various opportunities". The Court therefore said the Company "has foregone the opportunity to question the propriety of the order". In *Natl. Labor Relations Board* v. *Ed. Friedrich*, 116 F. (2) 888, the respondent complained of an unfair hearing because, *inter alia*, the examiner "unduly limited respondent's right of cross-examination". The Court

of Appeals for the 5th Circuit said they found nothing of substance in the complaints of procedure at the hearing for the reason—

> "the matter inquired about was not material and if the cross-examination had elicited the answer respondent desired, the findings would not have been affected thereby. Proceedings of this kind are substantial in their nature, and however much respondent's spirit may be galled by unjust and arbitrary rulings, they furnish no ground for action here, unless injury has resulted from them."

The instant proceeding was reopened for the second time and set for further hearing on November 2 and 4, 1942, on a petition filed by the Price Administrator on behalf of the Director, for the purpose of permitting the Price Administrator to offer on behalf of the Director evidence concerning the comprehensive national economic policy developed in accordance with the Emergency Price Control Act of 1942, as amended by the Act of October 2, 1942, and the effect thereon of increase in rates and charges of common carriers or other public utilities (R. I, 59, 62-63). On those two dates, counsel for the Price Administrator offered no evidence on those subjects (R. I, 183-229). He completely abandoned the very purpose for which the proceeding was reopened the second time. In *Vandalia Railroad* v. *Public Service Commission*, 242 U. S. 255, the Railroad Commission of Indiana, upon petition of the Vandalia and other railroads, set down for hearing the question of modification of its order. At the re-hearing, the applicants withdrew their application for modification. The Vandalia contended that the order deprived it of property without due process of law. In answer to that contention this Court said:

> "And since the record shows that plantiff in error and

its associates were accorded a rehearing upon the very question of modification, but abandoned it, nothing more need be said upon that point" (Page 261).

Since counsel for the Director failed to offer any evidence in response to the petition on behalf of the Director to reopen the proceeding, he "failed to take advantage of the various opportunities" and "has foregone the opportunity to question the propriety of the order". *Alabama Power Company Case, supra.* Since his counsel failed to take advantage of the opportunity afforded, and since he abandoned the very purpose for which the proceeding was reopened for the second time, he has not been denied due process. He "could not complain that he was not given a fair hearing". *Ruse* v. *United States,* 129 F. (2) 204 (6th Circuit).

Having failed to use the opportunity afforded it by the hearing of November 2 and 4, there was no denial of due process. *Midland Realty Co.* v. *Kansas City P. & L. Co.,* 300 U. S. 109, 113, 114. This Court in *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U. S. 575,584, said:

> "So far as the order is supported by the evidence the companies cannot complain that they were denied a full hearing because they had not been able to examine on redirect their own witnesses who had not been cross-examined, or because they had no opportunity to cross-examine or rebut witnesses who were not offered by the Commission. *The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered.*" (Italic added.)

At Page 586 of that decision, the Court said:

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power

has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

This Court in *Federal Power Commission* v. *Hope Natural Gas Company*, Nos. 34 and 35, October Term, 1943, referred to the above-quoted statement from the *Pipeline* case and said when the regulatory body's order is challenged in the courts, "the question is whether that order" viewed in its entirety "meets with the requirements of the Act". The Court continued:

"Under the statutory standard 'just and reasonable' it is the result reached not the method employed which is controlling. * * * It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

The Petitioners have utterly failed to show that the Commission's order is unjust and unreasonable in its consequences.

In the *Hope* case, this Court said it is not important "to determine the various permissible ways in which any rate base on which the return is computed might be arrived at". It will be remembered that the standard of "just and reasonable" in the Act under which the Federal Power Commission was acting is the same standard which Congress has prescribed for the Commission in the Act creating it.

The Petitioners have asserted that the Commission has failed to perform its duty under its own statute. The same contention was made by the Hope Natural Gas Co. in that the Federal Power Commission had not allowed a return for gas production that would be enough to induce private enterprise to perform its functions for the public. This Court said the Federal Power Commission was not oblivious to these matters. "It considered them". The Court added that no serious attempt had been made to show that they were inadequate, and said it cannot say they are inadequate "unless we are to substitute our opinions for the expert judgment of the administrators to whom Congress has entrusted the decision". In the instant case, the Petitioners accepted the adjustment of operating expenses made by the Commission's staff and its calculations under the sliding scale method. The Petitioners did not offer a word of evidence as to the justness or reasonableness of existing rates or what constituted just and reasonable rates. If this Court may not substitute its opinion for the expert judgment of an administrative body, may the Petitioners substitute theirs for such administrative findings?

After the Commission had promulgated its order the Petitioners filed petitions for reconsideration, which were denied by the Commission. They offered no evidence in support of their petitions for reconsideration. They were "apprized of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence". They have had a "full and fair hearing". *Carter* v. *Kubler*,

U. S. , 64 S. Ct. 1, 3, 4. They had ample opportunity to present whatever support they had, and they have had a full and fair hearing. *Crescent Express Lines* v. *United States*, U. S. , 64 S. Ct. 167, 169.

Limitation to Issues Raised by the Order Instituting the Investigation and the Notice of Hearing Is Not a Denial of a Full and Fair Hearing.

On Page 35 of their brief, the Petitioners complain because the Commission imposed "the same restrictions" upon the participation of the Director as were previously imposed upon the Administrator. When it is remembered that the same counsel who had appeared and participated throughout all proceedings on behalf of the Administrator, appeared on behalf of the Director, and made the same motions and the same argument, it is obvious why "the same restrictions" were imposed. When he appeared as counsel "on behalf of the Director", he did not offer any new witnesses or new evidence. If the Director has cause to complain, it is that his counsel did not do what his petition of intervention requested permission to do. He may not complain of denial of a full and fair hearing *because his counsel offered no evidence*. *Federal Power Commission* v. *Natural Gas Pipeline Co., supra.*

The Petitioners assert (page 36) that the Commission's order of October 23 restricted the Director to presentation of "additional evidence relating to the inflationary effect, if any, of an increase in the rates authorized by Order No. 2401". If we have correctly understood the position of the Petitioners, both here and below, it has been their contention that the Price Control Act and the Stabilization Act were for the purpose of preventing inflation. In fact, the Petitioners assert on Page 21 of their brief in this Court, that the purpose of the Stabilization Act "was to halt the inflationary trends then accelerating". Is it not, therefore, reasonable to expect that

if the Director had any evidence it would be evidence "relating to the inflationary effect" of the proposed increase in rates? Since his counsel did not offer any, it must be presumed that he had none, or such that he had would not have served his cause. If one has knowledge of facts, it is presumed he would produce them, and his failure to do so strongly suggests they would not support the position taken.

Lewis-Simas—Jones Co. v. *Southern Pacific Co.*, 283 U. S. 654, 663;
Baltimore and O. R. Co. v. *United States*, 298 U. S. 349, 381.

The Petitions of Appeal Fail to State Causes of Action for Which Relief May Be Granted, and the Court of Appeals Properly Directed that the Appeals be Dismissed.

The Commission's findings and opinion and the facts of record show there was ample evidence to support its findings. *L. T. Barringer & Co.* v. *United States*, 319 U. S. 1, 14; *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 80; *State of Florida* v. *United States*, 292 U. S. 1, 12, 13; *Natl. Labor Relations Board* v. *Waterman S. S. Corp.*, 309 U. S. 206, 213, 224, 226. The Commission's findings are adequate to support its order. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663, 664; *State of Florida* v. *United States, supra*, at Page 11; *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 406.

In view of the Commission's findings supported by substantial evidence, its action is not arbitrary or capricious. The decision below directing that the appeals be dismissed should be affirmed. *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176; *L. Singer & Sons* v. *Union Pacific Railroad Co.*, 311 U. S. 295.

The Price Administrator has no authority to control public utility rates. None of his legal rights have been invaded by the Commission's action and therefore he has no right of ac-

tion against the Commission. *Moffat Tunnel League* v. *United States*, 289 U. S. 113; *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 254; *Edw. Hines, Trustees*, v. *United States*, 263 U. S. 143, 148; *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 281 U. S. 479.

The refusal of the Commission to enter into an investigation different from that covered by its order of investigation and notice of hearing, violated none of their legal rights. *Alexander Sprunt & Son* v. *United States, supra; Edw. Hines, Trustees* v. *United States, supra.*

The issues raised by the Petitioners before the Commission were not germane nor related to the inquiry instituted, and the refusal of the Commission to reconsider and revise the provisions of Order No. 1458 did not give the Petitioners a cause of action. *Powell* v. *United States*, 300 U. S. 276, *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 44 L. ed. 782; *Pittsburgh & W. Va. Ry. Co.* v. *United States, supra.*

The promulgation of Order No. 1458 creating the sliding scale plan was authorized by statute, and could not be attacked in this proceeding. Therefore their appeals stated no cause of action, and were properly dismissed. *Utah Fuel Co.* v. *Natl. Bituminous Coal Commission*, 306 U. S. 56; *Edw. Hines, Trustees* v. *United States, supra; Home Furniture Co.* v. *United States*, 271 U. S. 456; *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299; *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469; *Standard Oil Co.* v. *United States*, 283 U. S. 235.

The actions of a regulatory body carry with them a presumption of validity and the burden is upon one seeking to attack them, both to allege and prove facts to overcome the presumption. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178; *Public Service Commission* v. *Great Northern Utilities Co.*, 289 U. S. 130; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Pacific States Box & Basket Co.* v. *White, supra.*

Interveners May Not Change or Enlarge the Issues nor Broaden the Scope of the Proceeding. The Interveners may not Control the Range of Investigation of an Administrative Body.

The principal contention of the Petitioners is that they were denied a full and fair hearing because the Commission refused to enlarge the issues and broaden the scope of the hearing for the purpose of permitting them, as interveners, to attack the sliding scale arrangement. They asked the Commission to review, reconsider and revise the provisions of Order No. 1458. These requests were not in subordination to nor in recognition of the inquiry instituted by the Commission. Indeed, they were in defiance of the order of investigation and the notice of hearing. They challenged the power of the Commission to make "any determination of rates" under the formulas "contained in the sliding scale arrangement" (R. I, 125), and asserted "as a matter of fact it would be illegal for the Commission to fix rates" without granting their requests (R. I, 140).

This challenge of the Petitioners of the Commission's power to make a determination of rates under the plan; and assertion that the determination of rates thereunder without granting their requests would be illegal, was antagonistic to the very purpose for which the Commission issued its order of investigation and its notice of hearing. Their challenge was an effort to dispossess the Commission of its authority contained in Paragraph 18 of the Act. The attack upon the proceeding clashes with orderly procedure and is contrary to the very purpose of intervention.

The 8th Circuit in *Adler* v. *Seaman*, 266 F. 828 (certiorari denied, 254 U. S. 655), defined intervention as follows:

> "It is a method of practice by which one having an interest or right, which will be affected by existing litigation to which he has not been made a party, may,

> if he desire, by leave of court come into that litigation to protect such interest or right. Rocca v. Thompson, 223 U. S. 317 * * *. It is not an independent action, but is ancillary and supplemental to the existing litigation (Rouse v. Letcher, 156 U. S. 47, * * * 39 L. Ed. 341), and must, under the limitations expressed in rule 37, 'be in subordination to, and in recognition of, the propriety of the main proceeding.'"

This Court said in *Chandler & Price Co.* v. *Brandtjen & Kluge*, 296 U. S. 53—

> "The intervener was not entitled to come into the suit for the purpose of having adjudicated a controversy solely between it and plaintiff. Issues tendered by or arising out of plaintiff's bill may not by the intervener be so enlarged. It is limited to the field of litigation open to the original parties." (Page 57-58.)
>
> * * * * * * * *
>
> "The purpose for which permission to intervene may be given is that the applicant may be put in position to assert *in that suit* a right of his in respect of something *there* in dispute between the original parties." (Page 59.) (Italics added.)
>
> * * * * * * * *
>
> "Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill." (Page 59.)

By coming into the investigation, the Petitioners as interveners, did not deprive the Commission of its right to proceed with the investigation instituted by it. The interven-

tion has in no way changed the nature of the proceeding nor did it change the rights and powers of the Commission. *Thorn Wire Hedge Co.* v. *Fuller*, 122 U. S. 535, 542, 543; 30 L. ed. 1235.

To permit intervention, the interest and rights of the intervener must be in the subject of the original investigation ordered by the Commission. *Smith* v. *Gale*, 144 U. S. 509; 36 L. ed. 521.

The Petitioners, as interveners, were not entitled to be heard upon a reconsideration and revision of the provisions of the sliding scale plan except in a proceeding instituted for that purpose. *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 258. The conduct of the Petitioners, as interveners, must be ancillary to the investigation ordered and their participation therein limited to such proceedings. *Guerra* v. *American Colonial Rank*, 21 F. (2) 56, certiorari denied, 275 U. S. 567.

In *Premium Ice Co.* v. *Maltbie*, 43 N. Y. S. (2) 71, the Public Service Commission had canceled a rule and regulation filed by the utility as a part of its rate schedule and substituted another rule and regulation therefor. The Ice Company asked the Commission "to broaden the scope of the hearing to include the reasonableness generally of the rates, charges and regulations" of the utility, which the Commission refused to do. The Court said, "Certainly the Commission was not required to grant the request" to broaden the scope of the hearing to include rates generally.

In *In re Schemmer*, 112 F. (2) 311 (7th Circuit), this Court denied a writ of certiorari (311 U. S. 697) to compel a court to permit intervention for the purpose of attacking an order appointing an adviser and to vacate the order providing compensation for his services in a reorganization proceeding.

The 10th Circuit, in *White* v. *Hanson*, 126 F. (2) 559, affirmed the decree denying intervention, in which new and independent issues were set forth. The 7th Circuit affirmed

a decree denying a petition to intervene which raised new issues in *Austin* v. *Garard*, 61 F. (2) 129.

The Court of Appeals for the 4th Circuit has, in several instances, held that intervention must be in subordination to and in recognition of the propriety of the original proceeding and that interveners may not litigate questions outside of those issues and not within the scope of the original suit. Thus in *Board of Drainage Commissioners* v. *Lafayette Southside Bank of St. Louis*, 27 F. (2) 286, 296, it said that to seek intervention with a view to challenging the jurisdiction of the Court "or otherwise inaugurating litigation not within the scope and purview of the original suit" is not permissible. In *State of North Carolina* v. *Southern Railway Co.*, 30 F. (2) 204, 207, that Circuit affirmed a lower court decree dismissing bills of intervention because the interveners sought "to litigate questions outside of the issues made by the original pleading" not within the scope of the original suit. In *Union Trust Company* v. *Jones*, 16 F. (2) 236, 239, the 4th Circuit said an intervener could not come into a case and attack and disposses the court of its jurisdiction to proceed in an orderly way.

The 8th Circuit has held that interveners may not dispossess a tribunal of its jurisdiction and try matters not within the scope of the original proceeding or attack the propriety of the main proceedings. *Whittacker* v. *Brictson Mfg. Co.*, 43 F. (2) 485, 490. In *In re Veach*, 4 F. (2) 334, 336, the 8th Circuit said that counsel for the intervener frankly admitted his only purpose was "to launch an attack against the propriety of the proceedings" and refused intervention for that purpose.

It is a well-established principle of law that one may not intervene in a proceeding for the purpose of attacking a decree in that proceeding or a collateral decree. *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 556; *King* v. *Barr*, 262 F. 56 (9th Circuit).

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-143, this Court said that regu-

latory bodies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties". The Court said:

> "Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, *to control the range of investigation* in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services." (Italtics added.)

In *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U. S. 287, 304, the Corporation attacked gas rates fixed by an order of the California Commission. In affirming the order, this Court said:

> "We approach the decision of the particular questions thus presented in the light of the general principles this Court has frequently declared. We have emphasized the distinctive function of the court. We do not sit as a board of revision, but to enforce constitutional rights. * * * *The legislative discretion implied in the rate-making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself.* We are not concerned with either, so long as constitutional limitations are not transgressed." (Italics added.)

That general principle has recently been reaffirmed by this Court in the *Natural Gas Pipeline case* and in the *Hope Natural Gas Company case.*

Paragraph 32 of the Act creating the Commission (R. II,

248) gives the Commission power to adopt reasonable and proper rules and regulations "and to adopt and publish reasonable and proper rules to govern its proceeding and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it".

Pursuant to that power, the Commission issued its Rules of Practice and Procedure which provide that the granting of a petition to intervene shall not have the effect of changing or enlarging the issues in the proceeding, except where expressly requested and expressly granted after opportunity for hearing by all parties (R. I, 252).

The Commission conducted its proceeding in accordance with its statutory powers, its Rules of Practice and the orderly procedure in intervention cases.

Intervention Under Emeregency Price Control Act and Amendment of October 2.

We have at some length dealt with the status of an intervener and reached the inescapable conclusion that, as such, he is without authority to broaden the scope of the hearing. Does the Emergency Price Control Act of 1942 (56 Stat. 23) confer on the Price Administrator such authority as to require a different determination to be made in this case? The Act in terms denies to the Price Administrator authority to regulate "(2) rates charged by any common carrier or other public utility". It is conceded that the Washington Gas Light Company is a public utility within the meaning of the statute in question.

This Court in *Davies Warehouse Company* v. *Bowles*, decided January 31, 1944, considered rather fully the legislative history relating to the Emergency Price Control Act and the reasons underlying the action of Congress in refusing to vest the Price Administrator with jurisdiction over common carriers and public utilities. The Price Administrator, insofar as he appears as such, is without authority to deal with the mat-

ter of rates of public utilities. The question now, therefore, for determination is what authority was vested in the Director of Economic Stabilization by the order of the President designating him to receive the notice required by the amendment of October 2, 1942, which statute also required a public utility seeking a general increase to assent to intervention.

Neither the amendment itself nor the legislative history underlying it indicates the slightest intent on the part of Congress to interfere with the functions, duties, and jurisdiction of the various utility commissions of the United States, state or city. In fact, the contrary is clear. First of all, the amendment is directed to the utilities and not to the regulatory bodies. Under a literal reading of this amendment, if a company gave notice to the President and assented to intervention, the statute would be satisfied, even though the Commission should refuse to grant intervention, there being no requirement that a regulatory body acquiesce in such intervention. It, therefore, certainly cannot be contended under this statute that there is a denial of a full and fair hearing where the utility gave notice and assented to intervention and the petitioner was granted the right to intervene by the Commission for the purpose set forth in said petition.

While it is true that the Act of October 2 was not in effect when the Price Administrator sought to prevent the increase granted the Davies Warehouse Company by the California Commission, the logic and reason which the Court presented for the deliberate refusal of Congress to vest the Price Administrator with authority over the rates of common carriers and utilities is equally applicable as a bar to any attempt to interpret the amendment of October 2 as conferring such authority, as such construction would, as here demonstrated, result in conflict between Federal authorities and State authorities (the Public Utilities Commission of the District of Columbia falls in the latter category).

In dealing with the Emergency Price Control Act and after

the amendment of October 2, this Court said in the *Davies Warehouse* case, *supra*:

> "We think Congress desired to depart from the traditional partitioning of functions between state and federal government only so far as required to erect emergency barriers against inflation. No question as to the power of Congress to reach and regulate this business, should it find it necessary to do so, has been raised here. But as matter of policy Congress may well have desired to avoid conflict or occasions for conflict between federal agencies and state authority which are detrimental to good administration and and to public acceptance of an emergency system of price control that might founder if friction with public authorities be added to the difficulties of bringing private self-interest under control. Where Congress has not clearly indicated a purpose to precipitate conflict, we should be reluctant to do so by decision. In view of assurances to Congress that the evil would proceed only in a minor degree, if at all, from public utilities already under state price control, we think Congress did not intend, and certainly has given no clear indication that it did intend, to supersede the power of a state regulatory commission, exercising comprehensive control over the prices of a business appropriately classified as a utility. * * *"

Likewise in this case the Court said:

> "* * * Local institutions, customs, and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked

in the task of interpretation. At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that 'the extension of federal control into these traditional local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions."' * * *" .

We submit that the Commission in reopening a hearing which had been closed prior to the Act of October 2 and permitting intervention of the Price Administrator on behalf of the Director of Economic Stabilization with all the privileges and rights of an ordinary intervener, plus the specific right to intervene for the purpose of showing the inflationary effect, if any, of a proposed increase, satisfied liberally the requirements of the Act of October 2. The Emergency Price Control Act, as amended, neither in terms nor by any reasonable construction vested the Director with the right to enlarge the scope of the proceeding, or to change the method of determining the rate base, depreciation, rate of return, or other basic elements. In fact, the legislative history, as interpreted by this Court, clearly and unmistakably shows that Congress deliberately and intentionally denied the Price Administrator the right to control prices of common carriers and utilities, and merely required the utility to give notice and assent to intervention. To do otherwise would encroach upon the prerogatives of the regulatory bodies, cause conflict, and do far greater

harm than would any increase which might be granted by regulatory bodies.

In connection with the decision in the *Davies Warehouse Company* case, *supra*, it is interesting to note that the warehouse company had not had its rates increased since 1938, but that wages and cost of materials had increased. The California Commission in authorizing a general 15% advance said it would "permit applicants to increase their rates to reimburse them in part for their added labor expense." In the case at bar there had been no increase in rates since prior to 1935, when the sliding scale arrangement became effective, but here, too, there had been a substantial increase in wages, in fact in an amount which exceeded the increase in rates permitted by the Commission. The Public Utilities Commission of the District of Columbia found:

> "This increase in rates will not restore the earnings of the Company to the level obtaining prior to the decline, nor is it the intent of the sliding scale arrangement to do so. It will, however, tend to arrest the decline and preserve the principles inherent in the sliding scale arrangement, on which, as heretofore stated, the credit position of the Company depends in large measure."

Furthermore, the increase here authorized was only 2.28% and increased the cost of living index in the District of Columbia by only about 1/37 of 1%.

Petitioners Assert a Power, Which Has For Its Purpose and Direct Consequence the Destruction of State and Municipal Powers in the Field of Local Utility Rate Regulation.

In the introductory part of their argument, the Petitioners asserted on Page 20 of their brief—

"It will be observed that the questions raised do not turn on the mere construction of a local law and are not of limited local importance. Not only are the duties of the Commission under its statute essentially like those of federal rate-making bodies, but those duties cannot be considered apart from the supervening effect of national conditions and national legislation".

The Petitioners have devoted Pages 57 to 78, inclusive, of their brief to an effort to draw an inference of power from the Emergency Price Control as amended by the Stabilization Act. Their contentions have been answered by this Court in *Davies Warehouse Company* v. *Bowles*, No. 112, October Term, 1943, and in *City of Yonkers* v. *United States*, ___ U. S. ___, 64 S. Ct. 327, at page 331, where this Court said the existence of federal authority to act should appear affirmatively and not rest on inference alone.

In *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351, this Court said:

"* * * bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in Sec. 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated."

What the Court said in that case is most appropriate here, that—

"An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress" (Page 355).

The Determination of Fact Questions that Have Been Committed to Administrative Bodies Will Not Be Set Aside By the Courts if There Is Substantial Evidence to Support Them. The Ultimate Question on Review of Such Administrative Determinations Is Whether the Total Effect of an Administrative Order Is Unjust and Unreasonable. Administrative Bodies Are Not Bound by a Single Formula or Combination of Formulas.

In *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, October term, 1943, this Court said if the total effect of an administrative body's rate order cannot be said to be unjust and unreasonable, judicial inquiry is at an end. The fact that the method employed to reach the result may contain infirmities is not then important. An administrative body's order does not become suspect by reason of the fact that it is challenged. He who would upset the rate order made under statutory power has the heavy burden of making a convincing show that it is invalid because it is unjust and unreasonable in its consequences.

In *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, this Court said (page 586):

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produced no arbitrary result, our inquiry is at an end."

The ultimate question for the Court in review of the Commission's Order No. 2401 is the end result or the totality of the consequences of its order. *Hope Natural Gas* case, *supra*. *Railroad Commission* v. *Pacific Gas & Electric Company*, 302 U. S. 388, 394; *West Ohio Gas Company* v. *Public Utilities Commission*, 294 U. S. 63, 70; *Federal Power Commission* v. *Natural Gas Pipeline Company, supra*.

In *Railroad Commission* v. *Pacific Gas & Electric Company, supra*, this Court said the right to a fair and open hearing includes notice and opportunity to be heard and the regulatory body must act upon evidence and not arbitrarily. It said that when the rate-making agency gives a fair hearing, receives and considers "the competent evidence that is offered", and affords opportunity through evidence and argument to challenge the result and make such determination upon evidence and not arbitrarily, the requirements of procedural due process have been met, and the question that remains for the Court "is not as to the mere correctness of the method and reasoning adopted by the regulating agency, but whether the rates it fixes will result in confiscation" (page 394). The Court also said that the regulatory body's opinion shows precisely what it had done. The order here under attack shows precisely what the Commission did in the instant proceeding. It received all competent evidence. The Petitioners were afforded opportunity through evidence and argument to challenge the result. They offered no evidence challenging the justness or reasonableness of the rates involved. They did not suggest any rate schedules. They have utterly failed to show they were denied due process of law. The Court there said that the Court below was bound to go to the regulatory body's opinion to ascertain its findings (Page 400).

The Commission's findings and opinion are found at Record Pages 39 to 55, inclusive. The Commission discussed the evidence and made its findings of what it considered to be just and reasonable rates under the evidence. The Commission gave

consideration to the existing emergency conditions as found by its statements at Record Pages 40, 41, 45 and 48.

The Commission made its findings that an increase in rates was warranted and discussed its findings in that respect (R. I. 51-53). It then discussed the effect of the increased rates and said (R. I, 53-54):

> "The new domestic rates will result in an average increase of $.03 per month per customer. Domestic customers using 2,500 cubic feet or less per month will sustain no increase. Space heating customers' monthly bills for the eight-month heating season will be increased an average of $.57 for all customers. The typical space heating customer's bills will be increased by $.72 per month for the eight-month heating season. The average increase for commercial and industrial customers will amount to $.46 per month. The total increase for all customers is 2.28% in excess of rates for the preceding year.
>
> "The cost of gas constitutes but 1.17% of the average cost of living in Washington, according to statistics of the Labor Department, and based on the percentage increase for gas service just stated the cost of living index would be increased by only about 1/37 of 1%. We cannot conceive that such an increase would have material inflationary tendencies."

This Court has consistently and for a long time maintained the principle that determination of fact questions that have been committed to administrative bodies will not be set aside by the Courts if there is substantial evidence to support them. *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 304; *Interstate Commerce Commission* v. *Hoboken Manufacturers Railroad Company*, ____ U. S. ____, 64 S. Ct. 158, 164; *United States* v. *American Sheet & Tin Plate Company*, 301 U. S. 402, 408; *Swift & Co.* v. *U. S.*, 316 United States 216;

220-225; *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 146.

Even though upon a consideration of all the evidence the Court may reach a different conclusion from that reached by the administrative body, the Court is not authorized to substitute its own judgment for that of the administrative body. *Swagne & Hoyt* v. *United States*, *supra*, at page 304; *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U. S. 206, 226; *Virginia Electric & Power Company* v. *National Labor Relations Board*, 319 U. S. 533, 542-543.

It is not the province of a Court to absorb the function of administrative bodies. *Mississippi Valley Barge Line Company* v. *United States*, 292 U. S. 282, 286; *Gray* v. *Powell*, 314 U. S. 402, 412. In review of administrative findings the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Mississippi Valley Barge Line Company* v. *United States*, *supra*, at page 287. *Rochester Telephone Corporation* v. *United States*, *supra*, at page 146. Upon such review only questions affecting the constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the administrative body's order becomes incontestable. *Rochester Telephone Corporation* v. *United States*, *supra*, at page 140; *Interstate Commerce Commission* v. *Illinois Central Railroad*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541, 547.

Rate-making involves complicated and technical questions, the determination of which calls for the exercise of judgment of a body of experts informed by experience and training who have been brought into existence as best fitted to make such determinations. *United States* v. *Chicago Heights Trucking Company*, 310 U. S. 344, 353; *Armour & Co.* v. *Alton Railroad Company*, 312 U. S. 195, 200, 201; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546; *State of Florida* v. *United States*, 292 U. S. 1, 12. The structure of a rate

schedule calls in peculiar measure for the use of that enlightened judgment which the Commission, by training and experience, is qualified to form. *Mississippi Valley Barge Line Company* v. *United States, supra; State of Florida* v. *United States, supra.*

Petitioners Argue that the Commission and the Court of Appeals Misconstrued the Purpose and Nature of the Administrator's Requests. The Courts and the Commission Correctly Understood Their Position.

The Petitioners have argued, beginning on Page 51 of their brief, that the Commission and the Court of Appeals misconstrued the purpose and nature of the Administrator's requests. If this is true, the District Court also misunderstood the real purpose of the requests, because it said:

> "The Commission was requested to reconsider the basic principle of the sliding scale arrangement * * *." (R. I, 17.)

The District Court stated the Administrator contended that the Commission nullifed intervention "by refusing to reconsider the basic principles of the sliding scale arrangement", and that the Commission "refused to broaden the scope of its inquiry" (R. I, 17). That Court further found that the Commission regarded the inquiry within "the scope of the order of March 20" (R. I, 18).

The Commission, the District Court and the Court of Appeals all have stated the purpose of the interveners to be the same. The Court of Appeals said the important issue turned upon the action of the Commission "in refusing a demand of the Price Administrator that a thoroughgoing examination be made into the rate base, the rate of return, operation expenses and depreciation, and all other matters relative to the establishment of a fair return" (R. II, 431).

The Court of Appeals understood the requests of the inter-

veners exactly as did the District Court and the Commission. The Court quoted from the intervener's brief in that Court where it said it was "incumbent upon the Commission to reconsider all basic elements of the sliding scale arrangement" (R. II, 440).

In view of the foregoing facts, it cannot be said that anybody has misunderstood the purpose of the Price Administrator.

Evidence Offered by Petitioners Was Received and Considered by the Commission.

The Administrator offered testimony of three witnesses and several exhibits, all of which were received in evidence. The first witness described the toughness of the war and the emergency conditions resulting, and the policies of the Office of Price Administration. The second witness was the technical expert from the Federal Power Commission. He disclaimed any intention to go into the rate base. (R. I, 164). He testified and presented Exhibit No. 8, in which he accepted all the findings of the Commission's staff and the Company's witnesses except that he made a calculation for depreciation on the sinking fund method at the "suggestion" of counsel for Petitioners (R. I, 160), and computed income taxes at the rate of 19%. These were the only departures from the calculations made by the Commission's staff. This exhibit is reproduced at Record Page 420.

The third witness presented by the Petitioners was an assistant business analyst who presented three exhibits (Exhibits Nos. 10, 11, 12), all of which were received as evidence and are reproduced at Record Pages 421 and 422. Exhibit No. 10 (R. II, 421) shows on its face that it was taken from the Company's "annual report to stockholders", as admitted by the witness (R. I, 170). Exhibit No. 11 shows on its face that it was taken from the "annual report of the Public Utilities Commission, of the District of Columbia, 1940" (R. II, 421),

and was so admitted by the witness (R. I, 171). Exhibit No. 12 shows on its face that it was taken from "Federal Trade Commission report on Utility Corporations" and was so admitted by the witness (R. I, 172). The witness said the figures shown on Exhibit No. 12 were merely taken out of the report of the Federal Trade Commission (R. I, 174). It "was copied" from that report (R. I, 173). The exhibit includes appraiser's value made in 1903 and 1909. The witness, of course, knew nothing about the appraisal, or who made it, or the purpose of the appraisal. The exhibit purports to show the average capital employed and the rate of return from 1927 to 1934. The return is based upon the capital employed as shown in the exhibit, yet the witness who presented it did not know that the Commission had made a valuation of the Company's property in 1918 and in 1934 (R. I, 174).

The testimony of these three witnesses, including their exhibits, was all that the Price Administrator offered. When the exhibits were presented and the source from which they were taken had been stated and they were received in evidence, counsel for the Petitioners announced "That will be all" (R. I, 172).

The evidence, including the exhibits presented by the Petitioners, was received by the Commission and considered by it in its determination. The Chairman of the Commission stated that the Petitioners' evidence would be given weight by it "in the consideration of the case as a whole" (R. I, 183). In consideration of the record, the Commission gave consideration to existing conditions and the bearing of such conditions upon the questions before it (R. I, 40). It stated "careful study has been given to all factors having a bearing upon those problems in arriving at the decisions hereinafter set forth" (R. I, 41). In the consideration of the reasonableness of taxes to be allowed as an operating cost, the Commission said it weighed all the factors to the best of its ability (R. I, 48). Upon a study of the entire record, the Commission said that after considera-

tion of all factors having a bearing upon the case, it was of opinion that rate increases were warranted (R. I, 51).

At Page 21 of their brief, the Petitioners say the purpose of the Act of October 2, 1942, "was to halt the inflationary trends then accelerating". The proceeding was reopened for the second time to permit the Price Administrator to present evidence on that precise question. He did not call any new witnesses (R. I, 183-229).

It is argued (Page 54) that practically all such evidence was ignored by the Commission. The courts have never held that administrative orders are illegal because the triers of the facts were not convinced by testimony, particularly that kind that is conjectural and without knowledge on the part of the witness who presented it.

In *Federal Power Commission* v. *Hope Natural Gas Company*, Nos. 34 and 35, decided January 3, 1944, this Court approved the rejection by an expert body of testimony that was not convincing and did not have probative value. Citation of authority is not necessary to show that the weight of the evidence and the inferences to be drawn therefrom are for the regulatory bodies. This Court, in *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 668, said the fact that arguments of Petitioners and their testimony "has not proved persuasive" affords no basis for the contention that the regulatory body's action in making the order "was arbitrary or otherwise illegal".

The Petitioners assert (Page 54) that the Commission's failure to broaden the scope of the inquiry was because of its overestimate of administrative difficulties. No such language is found in the Commission's rulings and it is not the reasons stated by the Commission or by the District Court which vacated the Commission's order. The District Court said that the Commission regarded the inquiry "within the scope of the order of March 20" (R. I. 18), and for that reason found its action was arbitrary and illegal. The Chairman of the Commission stated the reason for refusing to review and revise the

basic elements of the sliding scale was because it was "not within the scope of the present proceeding" (R. I, 122). The present proceeding, of course, was instituted by the order of March 20, 1942, referred to by the District Court. The applicability the Petitioners seek to draw from *Phelps Dodge Corp.* v. *Natl. Labor Relations Board*, 313 U. S. 177, 198, that the Commission overestimated administrative difficulties, is not in point. The second sentence quoted by Petitioners from that case, however, is in point when it was said that all that was asked of the Board was to show that it "has exercised the discretion with which Congress has empowered it".

It is because the Commission "exercised the discretion with which Congress has empowered it" in the instant proceeding that the Petitioners are complaining. It is precisely because the Commission exercised the powers delegated to it by Congress, that the Petitioners contended that the Commission's order is illegal. That discretion is found in the language of Paragraph 18 of the Act creating the Commission (37 Stat. 980, Sec. 43-217, D. C. Code 1940), which the Petitioners did not quote, that the sliding scale arrangement shall not be lawful "until it shall be found by the Commission, after investigation, to be reasonable and just and not inconsistent with the purposes of this section". The right and power to make changes in the plan is specifically reserved to the Commission as it "may ascertain and determine to be necessary and reasonable". The Chairman of the Commission announced that when the Commission decides to open an investigation into the basic elements of the sliding scale "it will give appropriate notice and conduct that investigation as a separate problem" (Page 772, proceeding before the Commission).

The Petitioners say the Administrator possessed substantial evidence dealing with the financial history of the Company, and that practically all such evidence was ignored by the Commission (Page 53). Such financial history as the Administrator presented through his witness and his exhibits were compiled from reports to stockholders, the Commission's own

annual reports, and reports of the Federal Trade Commission (R. II, 421-422). The Commission's staff offered in evidence a complete financial history of the Company, including all of its financing in the proceedings of two finance dockets before the Commission, as Exhibit No. 3. To show that the Commission did not ignore the testimony dealing with the financial history of the Company, reference is made to the Commission's findings and opinion (R. I, 43-44, 50-51).

The Petitioners Were Not Denied a Fair Trial Because the Commission Did Not Find Persuasive Their Testimony and Theory that the Sinking Fund Method Is the Only Lawful Method of Determining Depreciation.

On pages 36 to 45 of their brief, the Petitioners complain because the Commission did not change the method of determining depreciation, as set forth in the sliding scale plan, to a sinking fund method. They say (page 41) that the Commission did not give them a full and fair hearing because they were not permitted to introduce testimony or that the Commission did not give "evidence of its consideration".

The statement of Petitioners that the Commission denied them the right to offer evidence on the question of depreciation is contrary to the record. Mr. Joseph, referred to elsewhere by the Petitioners as "one of the principal technical experts in the employ of the Federal Power Commission" (page 53), presented his evidence, including Exhibit No. 8, at the hearing on September 14, 1942 (R. I, 158, 169). Preceding the explanation of the witness's conclusions, the following question and answer appear (R. I, 160):

> "Mr. Booth: What is the basis for the change which you have made with respect to the item of depreciation?
>
> "Mr. Joseph: Pursuant to your suggestion, I used the sinking fund basis for depreciation to arrive at

the annual provision for depreciation shown in my exhibit."

The following question and answer appear at record page 162:

"Mr. Booth: Did you conclude your explanation as to why you used an interest rate of 6½ per cent, Mr. Joseph?

"Mr. Joseph: I think I did, Mr. Booth."

Continuing, the following questions and answers appear at record pages 166-167:

"Mr. Booth: Mr. Joseph, after making the adjustments which you have discussed, do you find that there is an excess or deficit in this company's basic return?

"Mr. Joseph: I find there is an excess.

"Mr. Booth: What is the amount of the excess in basic return?

"Mr. Joseph: $95,335."

The exhibit presented by Mr. Joseph was received in evidence and is reproduced in the record before this Court at page 420, and shows it was received in evidence on September 14. The exhibit shows the rate base, the adjusted operating revenues, operating expenses, including depreciation on "6½%—43-year Sinking Fund on $26,000,000". It shows the excess in basic return of $95,335, as testified to by the witness and the amount available for rate reduction of $47,668 (R. II. 420). The following question and answer appear at page 169 of the record:

"Mr. Booth: Do you have anything further to add at this time, Mr. Joseph?

"Mr. Joseph: I think not, Mr. Booth.

"Mr. Booth: That is all."

The Petitioners assert that the hearing cannot be regarded as a full or fair hearing, because it is quite evident, as they contend, that the Commission "accorded no consideration" to the sinking fund method of determining depreciation, prepared by Witness Joseph "at the suggestion" of the Petitioners' counsel. The rejection of evidence that is not persuasive or evidence that is too conjectural to have probative value does not mean that "a full and fair hearing" has been denied. Nor does the rejection of conjectural evidence in the consideration and determination by a regulatory body constitute arbitrary and illegal action. *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U.S. 287, 307, 310, 311, 319; *Dayton Power & Light Co.* v. *Public Utilities Commission*, 292 U.S. 290, 299; *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 397, 398; *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 163, 164.

In *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, and in *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, decided January 3, 1944, this Court sustained the action of the Federal Power Commission in rejecting evidence that was not persuasive.

The contention of the Petitioners is that the Commission did not give them a full and fair hearing because it refused to accept the sinking fund method submitted by their witness, instead of the modified straight-line method provided in the sliding scale plan. Justification for the Commission's rejection of the depreciation determined by witness Joseph may be found in statements of the witness reproduced in the Petitioners' brief at pages 37 to 40, inclusive. The witness was asked by his own counsel how he arrived at the amount of $26,000,000 as a sinking fund upon which to apply the sinking fund interest rate, and he answered that it represented his "estimate of the maximum amount of depreciable property contained in the rate base figure of $28,088,332", shown by the Commission's staff (page 38 of Petitioners' brief; R. I. 163). The determination of a reasonable allowance for depreciation

is, of necessity, an estimate, because no one can measure in exact dollars the physical depreciation taking place in the property in a year. But in the determination of depreciation allowance, the base upon which the estimate is predicated should bear some relation to reality. An estimate based upon an estimate, merely to arrive at a desired result, has no probative value. The refusal by the Commission to give consideration to such conjectural testimony does not have any relation to "a full and fair hearing", nor does it make the Commission's findings arbitrary and illegal.

The witness had made no study of the property accounts or of the property itself, and did not show a familiarity with the physical property. All of the basic figures contained in his Exhibit No. 8 are merely lifted from the Commission's exhibit and the Company's exhibit, except the witness's calculation of depreciation on the sinking fund method and computation for Federal income taxes at 19%. The record indicates that the witness did not know the basic difference in the kind of operation conducted by the Company and that conducted by the Natural Gas Pipeline Company, as indicated by his answer to the Chairman of the Commission, when the Chairman asked him if he could mention "any points of similarity between the Natural Gas Pipeline Company and the Washington Gas Light Company in the nature of their business". The witness answered that the *nature of accounting* for both companies is precisely the same in that they keep their records under the Uniform System of Accounts prescribed by the Federal Power Commission (R. I, 165). But the Uniform System of Accounts does not specify the method to be used for computing depreciation expense. To illustrate, in the *Natural Gas Pipeline* case depreciation was computed on the sinking fund basis, and in the *Hope Natural Gas Company* case it was computed on the "straight-line service life method" 44 P.U.R. (N.S.) 119. This Court approved both methods of determining depreciation allowances in those two cases, where the Uniform System of Accounts was used.

Thus, it appears that the only justification which the witness could give to support the petitioners' claim that the sinking fund method should be substituted for the sliding scale method, is entirely without merit. In the *Natural Gas Pipeline* case it was estimated and agreed that the property would expire by the year 1954, whereas the Company here involved is a retail distributing company with an indefinite life, serving a growing metropolis. The Company has been in existence since 1848. The evidence indicates an anticipated expansion and growth of its business.

The Petitioners contended before the Commission that the only "legal" method of computing accruals for depreciation was the sinking fund method, because this Court approved that method in the *Natural Gas Pipeline* case. But the decision in the *Hope Natural Gas Company* case, where the straight-line service life method was used by the Federal Power Commission and approved by this Court, completely nullifies this contention.

The Petitioners contended that the sinking fund method is one of the basic principles of rate-making. In support of that statement, they quote in footnote 12, on page 42 of their brief, from a report of the Committee on Depreciation, National Association of Railroad and Utilities Commissioners (1943, from page xix). The quotation from that report does not even suggest the sinking fund method as being a proper method for rate-making purposes. Particular attention is called to the language of that Committee's report, where they said the sinking fund method "may sometimes be used in rate making". But the Petitioners failed to quote the conclusion of the Committee on Depreciation of the National Association of Railroad and Utilities Commissioners, found in the same report and on the same page, where the Committee said:

> 41. "The use of the straight-line method in determining both depreciation expense and accrued depreciation is *generally recommended for rate making purposes.*" (Italics added.)

The Petitioners further contend that the interest rate on the sinking fund should be the same as the rate of return, and in support thereof cite the conclusion of the Committee on Depreciation. This is additional proof of the wisdom of the Commission in rejecting the sinking fund method for use under the sliding scale method of fixing rates. In order to amortize a fixed amount over a fixed period of time, the sinking fund method requires a constant interest rate and, if as the Petitioners contend the interest rate should be the same as the rate of return, the rate of return must also remain unchanged or there would result either an understatement or an overstatement of previous depreciation accruals whenever the rate of return should be changed. The rate of return is built upon varying factors, and with each fluctuation in any of those factors resulting in a change in the rate of return, it is evident that the purpose of depreciation accounting would not be accomplished if the interest rate on the sinking fund were changed accordingly.

There are more cogent reasons for rejecting the sinking fund method proposed by the Petitioners in the instant proceeding. They offered no evidence as to the adequacy or inadequacy of the reserve created by the use of the sliding scale method of accruing depreciation; they offered no evidence as to the adequacy or inadequacy of the amount of the accrual computed under the method they suggested; they offered no evidence that 43 years even approaches a proper life expectancy of the property; they offered no evidence of the effect of future property changes in the sinking fund method they suggested. All of these factors were determined by the Federal Power Commission in the *Natural Gas Pipeline Company* case, where a sinking fund method was used. On the other hand, the Commission made an investigation and held hearings and had all pertinent facts relating to these important factors when it adopted the depreciation method in the sliding scale arrangement. This method has been twice approved by the District Court of the United States for the District of Colum-

bia in *Potomac Electric Power Co.* v. *Public Utilities Commission*, Equity Nos. 35336 and 35341, in 1924 and again in 1932, when it found "the great desirability of retaining in effect the sliding scale method". There is additional reason for not accepting the rate of interest on the reserve balance suggested by the Petitioners, and that is that depreciation is not determined by the Commission for rate-making purposes under a sinking fund method.

In brief, the Petitioners complain, not that the accrual for depreciation allowed by the Commission as an expense is excessive or that the reserve for depreciation is excessive or inadequate, but that the Commission did not blindly accept a method in which a computation was quickly made producing a smaller figure, in place of the method which had been found to be just and reasonable to both the rate payers and the Company. Whether the accrual allowed by the Commission or the reserve for depreciation was excessive or inadequate, the Petitioners did not know and made no effort to ascertain.

The contention of Petitioners that the Company will be unjustly enriched at the expense of consumers by the use of an interest rate different from the rate of return, would be true only if the depreciation reserve were not treated as a source of funds in the determination of a fair and reasonable rate of return. The Petitioners cite Paragraph 16 of the Act creating the Commission to support their contention that the interest rate of 4% on the retirement reserve is unlawful. This contention can be supported only on the false assumption that all moneys invested in the plant are at a uniform rate, that is to say, that bonds, preferred stock, common stock and the depreciation reserve are entitled to a uniform rate of 6½%. But this is not true. Bonds, preferred stock, common stock and the depreciation reserve do not carry the same interest or dividend rates. The rate of return is predicated upon a consideration of the cost of the various types of capital invested in the property, and in fixing that rate, the interest rate of 4% on the reserve balance was given its proper weight

along with the interest rate on long-term debt, the dividend rate on preferred stock and the reasonable return on the common stock equity. The primary rate of return fixed by the Commission in Order No. 2682, referred to by the Petitioners on page 53 of their brief, was determined upon a consideration of these factors, including the interest rate of 4% on the depreciation reserve. If the interest rate on the reserve balance were increased to 6½%, the rate of return would likewise have to be increased to some extent to prevent a diminution of return on other sources of capital.

It is not true that the Company earns 6% on its rate base. It hasn't for more than two years. That part of the rate base created by the use of the money set aside as a depreciation reserve earns only 4%, the rate fixed by the Commission. So long as that continues, the provisions of Paragraph 16 are fully complied with. The Commission was fully aware of the provisions of Paragraph 16 when the plan was promulgated and the interest of 4% on the reserve was fixed as a proper amount and, as previously stated herein, has been approved by the District Court of the United States for the District of Columbia. The Petitioners made no study of the actual depreciation of the Company's property or its expected life, as the the Federal Power Commission did in the *Natural Gas Pipeline* case. Their witness, at the "suggestion" of his counsel (R. I, 160), blindly assumed a life of 43 years for a growing piece of property that has been in existence since 1848, and, as the evidence of record shows, the Company anticipates an expansion of its facilities. The refusal to change the method of determining depreciation accruals from that which was found after investigation and hearing to be an appropriate method, does not constitute a denial of a full and fair hearing. Neither does it constitute arbitrary and illegal action.

Under the statutory standard of determining just and reasonable rates, it is the result reached, "not the method em-

ployed which is controlling." *Federal Power Commission* v. *Hope Natural Gas Co.*, *supra*, and authorities there cited.

The determination of whether the Commission should adopt a service life method of determining depreciation or a sinking fund method is a matter that is committed to a regulatory body best qualified to pass upon the complex questions involved in rate making. In such matters, judicial action cannot supplant the discretionary action of the administrative body. *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 691; *Federal Power Commission* v. *Hope Natural Gas Company*, Nos. 34 and 35, October Term, 1943; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U.S. 156, 160; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 353; *Armour & Company* v. *Alton Railroad Company*, 312 U.S. 195, 200, 201.

The Petitioners assert (page 46) that the Company is being unjustly enriched by over $225,000 annually on the assumption that the dissenting Commissioner "has estimated with a substantial degree of accuracy" the accrued depreciation. In making this bold assertion, which is contrary to facts of record, the Petitioners fail to state that the figures they quote were not only unsupported by testimony of any witness, but are actually contrary to the evidence of witnesses of both the Company and the Commission. Regulatory bodies and courts do not take unsupported "estimates", even when they are made by experts, as findings of fact. This Court condemned findings by a regulatory body when they were not based upon evidence. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63 *Ohio Utilities Co.* v. *Public Utilities Commission*; 267 U. S. 359; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274; *Northern Pacific Ry. Co.* v. *Dept. of Public Works*, 268 U. S. 39.

The so-called "estimated" reserve for depreciation was taken from page 37 of the dissenting opinion in the rate case involving the year 1943. On the same page of that dissenting opinion, it was stated that the reserve for depreciation should

be increased by approximately $4,236,000. By letter dated January 7, 1944, that "estimated" depreciation was reduced to $2,767,600 without additional testimony on the subject, or without statement of reasons for the reduction of approximately one-half. This illustrates the infirmities of making estimates without supporting data.

The Sliding Scale Arrangement Was Adopted after Careful Investigation, Hearing and Consideration.

In the statement of the case (page 9), the Petitioners say that the Commission approved the sliding scale arrangement as proposed by the Company. The apparent inference left to be drawn from that statement is that the Commission blindly accepted a plan proposed by the Company, which is contrary to fact. A sliding scale plan had been the subject of study for years by the Commission and by Citizens' Associations, and the plan adopted was one that was worked out by the Commission's staff, Peoples' Counsel and representatives from Citizen's Associations and the Company. (R. II, 439.)

Indeed, Paragraph 18 of the Act provides that a public utility, with the consent of the Commission, may provide a sliding scale of rates, but that paragraph provides that such plan may not be lawful until it is found by the Commission, after investigation, to be reasonable and just. The plan was adopted after years of study, investigation and hearing and was found to be fair.

The Petitioners also state on page 9 in their statement of the case, that the Commission entered an order fixing $15,039,000 as the fair value of the undepreciated property of the Company as of June 30, 1935. Petitioners then state that the sliding scale arrangement adopted by the Commission prescribed an undepreciated rate base of $21,000,000. Why the Petitioners attempted to tie the sliding scale rate base of $21,000,000 with a fair value of $15,039,000 of the Washington Gas Light Company is difficult to understand. The fair

value of $15,039,000 fixed by the Commission was not the value as of June 30, 1935, as stated by Petitioners, but was the value as of June 30, 1932, and does not include the finding of fair value of $1,954,000 for the Georgetown Gaslight Company as of June 30, 1932, or the value of the property of the Prince Georges Gas Corporation. The $21,000,000 rate base fixed in the sliding scale plan included the fair value of the property of the Washington Gas Light Company, the Georgetown Gaslight Company and the Prince Georges Gas Corporation, as well as the cost of net additions of property during the period from July 1, 1932, to June 30, 1935.

Furthermore, the statement of the Petitioners that the Commission entered an order fixing $15,039,000 as the fair value of the undepreciated property of the Company is contrary to fact. In Order No. 1341 (Exhibit "A"), the Commission found reproduction cost new of property of the Washington Gas Light Company, other than land, used and useful in furnishing gas service in the District of Columbia, to be $15,550,000. It also found the fair value of land used and useful to be $1,654,846. In arriving at the fair value figure, working capital of $689,000 was added to the sum of the foregoing figures and depreciation of $2,855,000 was deducted to arrive at the fair value of $15,039,000, quoted by the Petitioners. This finding of fair value, however, then covered only the facilities of the Washington Gas Light Company. As of June 30, 1932, the Commission also valued the facilities of the Georgetown Gaslight Company, Order No. 1342 (Exhibit "B"), which, subsequent to June 30, 1935, was merged with the Washington Gas Light Company. There the Commission found a fair value of $1,954,000 predicated on reproduction cost new of $1,845,000, fair value of land of $158,120, working capital of $133,000 and depreciation of $182,127. The foregoing findings of fair value, together with the cost of the property of the Prince Georges Gas Corporation, which was organized subsequent to June 30, 1932, and whose facilities were constructed between that date and June 30, 1935, at a

cost, as of that date, of $830,150.03, and additions to the property of the Washington Gas Light Company and the Georgetown Gaslight Company from July 1, 1932, to June 30, 1935, at cost, were the factors upon which the rate base of $21,000,000 was predicated.

While Petitioners have stated that the sliding scale plan provides that the initial rate base should be brought up-to-date annually by means of adjustments for net additions to property less consumers' contributions and less allowances for the proportion of property used outside the District of Columbia, they have failed to state that the plan contemplates a rate base at actual cost of property. They also failed to state that all additions are made at actual cost, and that retirements are made on the basis at which the property is included in the initial $21,000,000 rate base.

The Petitioners fail to state that the rate base unweighted on June 30, 1942, prior to allocation for service rendered outside the District and before including working capital, was $30,701,806.87, as shown by Exhibit No. 1. They failed to state that this amount was arrived at after deduction of $1,737,571.78 for contributions in aid of construction and deposits for extensions of mains. Thus, it is seen that the unweighted rate base on June 30, 1942, is predicated on $32,439,378.65 for gas plant in service. This unweighted base contains $1,055,549.52, representing the difference between the appraised value of land and the original cost. The rate base therefore, in sofaras gas plant in service is concerned, is 96.75% original cost as best it can be determined. The Commission found in Order No. 1341 (Exhibit "A") that the exact original cost of the property could not be determined.

The plan itself provides that additions shall be included in the rate base at actual cost. Since 96.75% of the rate base at the present time represents original cost of property, the rate base is substantially upon the prudent investment theory.

The Price Administrator did not question the calculations

made by the staff in its exhibits (R. II, 392). He offered no testimony on the subject of rate base, except that by Mr. Joseph, who expressly disclaimed any change in the rate base as found by the Commission, when he said "I have not changed the rate base used by the Public Utilities Commission accountants at all" (R. I, 164).

Rate of Return.

In the fourth question presented, the Petitioners say that the Company on its own figures was earning a return of 5% on a substantially undepreciated rate base, after all taxes and excess profits taxes. In their argument, page 79 of their brief, the Petitioners attempt to show that the Company's computation of return of 4.87% was in fact 5% by reason of a change in the provisions of the Revenue Act of 1942, which would reduce the tax liability on an "annual basis" by $36,000. In arriving at the 5% figure, the Petitioners have failed to state that the income under discussion is for the test year ended June 30, 1942, and that the $36,000 reduction in tax liability, referred to on page 79, is for the calendar year 1942 and only one-half of this reduction would therefore apply to the net income of $1,366,119, and not on an "annual basis" as stated by the Petitioners. The remainder of this amount would be reflected in the income for the test year ended June 30, 1943.

That the tax liability was not reduced on an "annual basis", as stated by the Petitioners on page 79 of their brief, is shown by the testimony of the Company's witness, and further shown by a question on cross-examination by counsel for the Petitioners when he asked the witness if the $526,000 was on an annual basis. The witness answered, "It is for the 12 months ending June 30, 1942" (R. I, 226).

By making two adjustments, (1) by adopting a sinking fund method and (2) by calculating taxes at 19%, the Petitioners by their own testimony found there should have been a rate

reduction of $47,668 (page 80 of the brief, Exhibit No. 8, R. II, 420). As further support for their contention that no rate increase was justified, they say on page 80 of their brief that the dissenting Commissioner, "after giving effect" to the matters they discussed in their brief and other factors, concluded that a rate reduction of approximately $1,000,000 was justified. A difference between $47,668 and $1,000,000 is so unreasonable as to show that neither calculation can be based upon the same considerations. No two individuals searching for the truth could from the same evidence arrive at such a colossal difference. The conclusion that a rate reduction of $1,000,000 was justified was not supported by a single word of evidence, and is in direct conflict with the testimony of the Chief Accountant of the Commission and the Company's witness.

The Petitioners have cited regulatory authorities fixing a rate of return of less than 6½%. They did not cite decisions by the Federal Power Commission, which has consistently allowed a rate of return of 6½% for gas companies. Furthermore, the regulatory authorities cited do not make annual adjustments of rates to keep abreast of current operating experiences, such as is done under the sliding scale plan.

On page 85 of their brief, the Petitioners say that on February 18, after the Commission's order had been set aside by the District Court, the Company sold 3¾% refunding mortgage bonds. The inference sought to be drawn is that the setting aside of the order made the bonds marketable. The Petitioners could hardly believe that between the date the District Court vacated the order on February 1 and February 18, the Company had been able to institute a bond selling program. On page 47 of their brief, the Petitioners say the Commission went outside the record to show in its opinion the earnings of the Company. The finding of the Commission in this respect is based upon the proceedings in two finance dockets before the Commission, which were received in evidence as Exhibit No. 3.

On pages 86 and 87 of their brief, the Petitioners set forth

facts which clearly demonstrate the advantages of the sliding scale plan. On page 86, the Petitioners point out that in 1931, the worst year of the depression, the Company earned 10.6%. On the next page they show that between 1936 and 1941, after the establishment of the sliding scale plan, the Company earned an average return of 6.86%. A reduction from 10.6% in the worst year of the depression to an average of 6.86% under the provisions of the sliding scale plan is convincing evidence of the effectiveness and the advantage of the sliding scale plan. In 1941, the Company earned 6.01%. In 1942, it earned 5.10%, after disregarding all excess profits taxes.

For the purpose of showing that the Company's financial position did not justify a rate increase, the Petitioners assert on page 87 of their brief that the depreciation reserve increased from $879,289 as of December 31, 1936, to $2,171,608 on December 31, 1941. These figures are shown on the Price Administrator's Exhibit No. 10 (R. II, 421), and are taken from the Company's annual report to its stockholders. The depreciation reserve shown in the report to stockholders, of course, is the corporate depreciation reserve and is not the same as the reserve determined under the sliding scale plan. But in making the comparison between the depreciation reserve of 1936 and 1941, the Petitioners fail to show the difference in the rate base between those two periods.

The Petitioners cite the testimony of the Price Administrator's witness Riley, that it was the practice of the Administrator to consider profits before Federal income taxes in determining the reasonableness of maximum prices under the stabilization legislation (page 892). On page 94, they say the general commercial practice is not to consider income taxes as an element of cost in the determination of the cost of production. The practice of the Price Administrator in fixing maximum prices deals with unregulated companies and not with common carriers and other public utilities that are already subject to strict State and Federal regulation. The commercial or unregulated companies are not limited to a fixed

earnings' rate as are common carriers and other public utilities. Commercial enterprises, prior to the Emergency Price Control Act, were free to make whatever profit and whatever rate of return their business would justify, but common carriers and other public utilities have not been free to make unwarranted and speculative profits and to engage in speculative practice.

On page 88, Petitioners infer that the small amount of the increase in rates had little or no effect on the ability of the Company to sell its securities. This inference completely ignores one of the most significant facts involved in this case. It was not the size of the increase nor the immediate effect on income that was important to the successful selling of securities. This was the first time under the sliding scale arrangement that an increase was indicated; hence the important question was whether the Commission would adhere to the arrangement. The integrity of the Commission was at stake.

The Commission's Order Is Not in Conflict with the Government's Program to Prevent Inflation.

The Petitioners alleged in their petitions of appeal and have argued below and here that the Commission's order is illegal because it was entered in disregard of the Government's program to prevent inflation and without consideration of economic conditions. This Court said in *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 400, *and Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 87, that it must look to the regulatory body's order to see what it did. In *Mississippi aVlley Barge Line Co.* v. *United States*, 292 U. S. 282, 287, this Court said the care and patience with which the regulatory body fulfilled its appointed task are plain, "even to the casual reader, upon the face of its report".

The casual reader will find upon the face of the order here under attack, a complete negation of the allegations and assertions of the Petitioners that the Commission's order is in disregard of the Government's program and without consider-

tion of economic conditions. The care and patience with which the Commission fulfilled its appointed task in the instant proceeding are plainly evident from the facts of record. It reopened the proceedings on two separate occasions. It granted continuances for the purpose of permitting counsel for the Petitioners to prepare testimony and to prepare cross-examination. It gave consideration to the most recent economic conditions. The exact care and regard which the Commission gave to the Government's policy to prevent inflation may be measured in dollars and cents in the application of the sliding scale plan alone. The Chief Accountant testified that in accordance with the calculations under the sliding scale arrangement, after disregarding all excess profits taxes, the Company was entitled to a rate increase of $324,718.06 and the Company's computation indicated an increase of $381,597 (R. I, 40-41). Out of regard for the emergency conditions, the Commission disregarded all excess profits taxes and in that respect sustained an adjustment eliminating excess profits taxes in the amount of $43,928.02 (R. I, 45, 49). Because of "present-day conditions" and after weighing all factors to the best of its ability, the Commission disallowed Federal income taxes in excess of 31% of the tax liability, which made another adjustment in the calculations under the plan of $115,863.09, and an item of $4,929.39 which under Section 6 of the sliding scale plan would have been included as an operating expense (R. I, 48, 49).

In addition to the foregoing, the Commission provided that, if the increase in rates it had authorized resulted in liability for excess profits taxes, all such increases should be refunded to the rate payers (R. I, 56-57). As a result of this provision of the order, all increases in rates between November 16, 1942, when the rates were put into effect, and December 31, 1942, were refunded to rate payers.

The weight to be given to the evidence is for the administrative body. In order to say that the adjustments made by the Commission were not in the proper amounts, the Court would

have to substitute its opinion for the amount of consideration that the Commission must give to all of the factors. It is not the function of the Court to make administrative findings of this character. While the Petitioners offered no testimony on the justness or reasonableness of the rates or what constituted proper rates, and even accepted the calculations made by the Commission's staff, they have argued that the Commission's findings are illegal. These arguments are not sufficient to cause this Court to act as an administrative tribunal to try the facts.

The Commission found that labor costs included in operating expenses for the test year exceeded labor costs for the prior test year by more than $300,000 (R. I, 51). The District of Columbia Gas Workers' Union stated that it had secured a raise in wages based upon the cost of living index, which was approximately a 16% increase in wages, or about $380,000 (R. I, 109). The increase in revenues from the increase in rates authorized was calculated to produce approximately $200,000, or approximately $180,000 less than the increase in wages paid by the Company to its employees. After making the refund provided for in the order, the increase in wages is more than $200,000 greater than the net increase, by reason of increased rates.

The Government has given recognition to the necessity for increased wages due to the increase in the cost of living index. That is demonstrated in the wage rate increases to coal miners in 1942 and in 1943, the increase to steel workers and to railroad operating employees. A study of price adjustments and commodity price increases made by the Price Administrator indicates that the determination of the Commission made in the light of emergency conditions and the various factors involved in rate making is not in conflict with the Government's program as established by the Office of Price Administration. Hundreds of price adjustments have been made by that office increasing commodity prices, but none has taken the form of a detailed and exhaustive investigation and hearings involving

all the basic factors that the Price Administrator's counsel contended in this proceeding were necessary to make a determination.

To illustrate that the Commission's action was not in disregard of the Government's program, the increase in the price of fuel oil for heating purposes in the tank wagon area of Washington, and the increase in the price of Pennsylvania anthracite may be considered. Fuel oil for heating purposes is used by approximately 60,000 consumers in the Washington area, compared with about 25,000 consumers of gas for space heating. An increase in the price of fuel oil would therefore affect more consumers and would have a much greater inflationary effect than would the increase in the price of gas for space heating. The Price Administrator increased the price of No. 2 fuel oil in the tank wagon area of Washington on February 2, 1942, to 7.6¢ (7 F. R. 720). On June 27, 1942, he increased the price to 10.2¢ (7 F. R. 4857), an increase of more than 34% over the February price. On August 3, 1942, he reduced the price to 9.1¢ (7 F. R. 6057). The August price was nearly 20% higher than the February price. Subsequently the price of No. 2 fuel oil was increased to 9.4¢, which is the present price and is approximately 23½% higher than the price in February, 1942. On January 31, 1944, the Price Administrator issued Amendment No. 3 to RO No. 47, under RMPR No. 22, effective February 1, 1944, increasing maximum prices of all sizes of Pennsylvania anthracite by 45¢ per net ton, or by 50¢ per gross ton; to absorb additional cost of wages to the miners. (This order had not been filed with the Federal Register when this brief was written.)

Justifiable increases in the price of commodities are not prohibited by the Emergency Price Control Act as amended, as has been demonstrated on many occasions by competent Governmental agencies. All increases are not contrary to the Government's program.

The Effect of Invalidation of Order No. 2401 in the Annual Application of the Sliding Scale Plan.

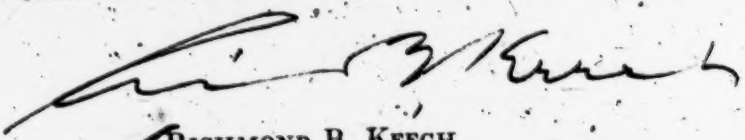
The sliding scale plan is a means of current adjustment of rates based upon current conditions. It does not permit a fixed rate for an indefinite period. Under the terms of the plan, the Commission on April 2, 1943, issued its Order No. 2554, calling for the annual investigation of rates of the Company under the provisions of the sliding scale plan, and on August 21, 1943, notice of hearing was issued. Hearings were held in August, September and November, 1943, as a result of which the Commission issued its Order No. 2682, reducing rates in the amount of $135,416.91 for the rate year beginning September 1, 1943. The calculations were based upon the operating experience and revenues of the Company for the test year July 1, 1942, to June 30, 1943, while the rates prescribed by Order No. 2401, here under attack, were in effect. The practical effect of the decrease effected by Order No. 2682 is to wipe out the previous increase.

CONCLUSION

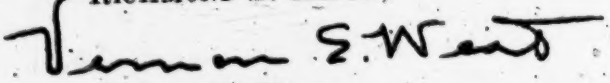
The Commission received the Petitioners' evidence and considered it together with all other evidence of record. The Emergency Price Control Act as amended by the Act of October 2, 1942, was complied with, in both letter and spirit. The Commission made its findings upon the evidence of record.

The Commission in this proceeding anticipated the purposes of the Act of October 2, 1942, even before it was enacted, and acted in its deliberate and considered judgment in the light of the Government's policy to prevent inflation and to stabilize the cost of living.

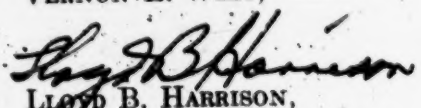
It is respectfully submitted that for the foregoing reasons the judgment of the court below should be affirmed and the validity of the Commission's order sustained.



RICHMOND B. KEECH,



VERNON E. WEST,



LLOYD B. HARRISON,

Attorneys for Respondent,
Public Utilities Commission,
District Building.